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IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted] 149

1963

O. C. LEE, Individually, and **J. C. LITSEY**, Individually, and Both as Representatives of Machinists Employed by Louisville & Nashville Railroad Company at Its South Louisville Roundhouse on February 17, 1957, Et Al., Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Et Al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. _____

O. C. LEE, individually, and J. C. LITSEY, individually, and both as representatives of Machinists employed by Louisville & Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

A. B. LEMASTER, individually, and A. P. ROTH, individually, and both as representatives of Electricians employed by Louisville & Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

K. L. PUTMAN, individually, and ROY FOWLE, individually, and both as representatives of the Pipefitters employed by Louisville and Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

FRANK WELLS, individually, and JOSEPH M. GORDON, individually, and both as representatives of Laborers employed by Louisville & Nashville Railroad Company at its South Louisville Roundhouse on September 17, 1957, - *Petitioners*,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY;

SYSTEM FEDERATION NO. 91 of the RAILWAY EMPLOYES DEPARTMENT, A.F.L.-C.I.O.:

Continued on Next Page

HERMAN WEBB, President, System Federation No. 91; and

RAY ABNER, Secretary, System Federation No. 91; both as representatives of said System Federation;

INTERNATIONAL ASSOCIATION OF MACHINISTS;

B. B. KIDWELL, General Chairman of said Association, and

JOHN W. HONADEL, President of Local No. 205 of said Association, both as representatives of said Brotherhood;

SHEETMETAL WORKERS' INTERNATIONAL ASSOCIATION;

CLIFFORD MCCUBBIN, President of Local No. 445, of said Association;

EDWARD A. CONNELLY, Local Chairman of Local No. 445, of said Association, both as representatives of said Association;

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;

ERNEST L. RYAN, President of Local Unit No. 1353 of said Brotherhood; and

HERMAN WEBB, General Chairman of said Brotherhood, both as representatives of said Brotherhood;

INTERNATIONAL BROTHERHOOD OF FIREMEN, OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS;

RAY ABNER, General Chairman of said Association, and

HARRY SEARS, individually, President of Local No. 1004, both as representatives of said Association, - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

Your petitioners, O. C. Lee and J. C. Litsey, individually and as representatives of the Machinists employed by respondent Louisville and Nashville Railroad Company at its South Louisville Roundhouse prior to February 18, 1957, A. B. Lemaster and A. P. Roth, individually and representatives of the Electricians employed by said respondent at its South Louisville Roundhouse prior to February 18, 1957, K. L. Putman and Roy Fowle, individually and as representatives of the Pipefitters employed by said respondent at its South Louisville Roundhouse prior to February 18, 1957, and Frank T. Wells and Joseph M. Gordon, individually and as representatives of the Laborers employed by said respondent at its South Louisville Roundhouse, respectfully pray that a Writ of Certiorari issue to review the judgment of the Kentucky Court of Appeals, entered November 2, 1962, which became final February 22, 1963. This judgment affirms a judgment of the Jefferson Circuit Court entered September 12, 1960, as amended October 6, 1960, dismissing for lack of jurisdiction, a Complaint for Declaration of Rights of the petitioners, as representing all sixty-six of the mechanical employees on the South Louisville Roundhouse rosters, under two similar collective bargaining agreements,

OPINIONS OF STATE COURTS.

Petitioners, and the other employees they represent, were, prior to February 17, 1957, employees working in the crafts of machinists, electricians, pipefitters and laborers, for the Respondent, Louisville and Nashville Railroad Company, in the South Louisville Roundhouse area, a separately designated seniority point. The four crafts had bargaining agreements with the Railroad Company through the four respondent International Associations or Brotherhoods, to-wit: International Association of Machinists, Sheet-Metal Workers International Association, International Brotherhood of Electrical Workers and International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

The first three groups, as skilled employees, had contracts as shown by a booklet filed in this action as Exhibit "A" with the Complaint for Declaration of Rights (T. 9). The fourth group had a contract as shown by a booklet filed in this action as Exhibit "B" with said Complaint (T. 9). On the Louisville and Nashville Railroad all four unions operated through a joint union agency, known as System Federation No. 91 of the Railway Employees Department, A.F.L.-C.I.O. a respondent herein.

The two bargaining agreements provided for separate seniority rosters for designated areas including the "South Louisville Roundhouse", an area in the L. & N. yards west of a division fence, established about 1901 and the "South Louisville Shops", an area

east of said fence established about 1908. On February 4, 1957 the Railroad Company posted its Bulletin No. 39 announcing that all mechanical operations of the South Louisville Roundhouse would be discontinued effective February 17, 1957. The bulletin said the employees would be cut off in force reduction. Every employee on the Roundhouse rosters was cut off by this bulletin. Immediately thereafter through posted notices, the same jobs in the same locations were offered to employees on the South Louisville Shops rosters.

There was in fact no reduction in forces whatever, just a shift to different rosters, with all the men on the Roundhouse rosters displaced, and replaced by employees on the South Louisville Shops rosters, as far as the men on said rosters desired the jobs in the Roundhouse area. Men on the Roundhouse rosters were permitted to work in their old area only with seniority from February 18, 1957 or later.

It developed that on January 28, 1957 the representatives of the respondent unions had held a conference with the respondent Railroad Company. The Railroad Company apprised them of its plans for discontinuing use of the Roundhouse rosters and combining the area of that district with the area of the Louisville Shops area. The Unions made no objections, but acceded to this action. However, none of the four International unions conferred with, or received any approval from, or even notified, the employees on the Roundhouse rosters before the bulletins were posted, cutting off all employees on these rosters.

In this action, petitioners are asking, for themselves and the rest of the sixty-six employees on the Roundhouse rosters, a Declaration of Rights in a controversy with the Louisville and Nashville Railroad Company and with the four International Associations or Brotherhoods and their joint agency, System 91, under said collective bargaining agreements. The only claims made herein by the 66 men on the Roundhouse rosters, are the specific contract rights to seniority, of the men on all the Roundhouse rosters, in the mechanical jobs in the Roundhouse area only. Petitioners needed this declaration on February 18, 1957. They need it now. The discrimination has continued. Both the Railroad Company and the unions have been, and are, actively resisting any declaration of rights, by motions to dismiss for lack of jurisdiction.

These motions were sustained by the Chancellor of the Jefferson Circuit Court in an opinion dated August 25, 1960.

A copy of said Opinion is included in Appendix A to this Petition as Item No. 1. The Judgment entered on September 12, 1960, pursuant to that Opinion, is included in Appendix A as Item No. 2. A copy of the Amended Judgment entered October 6, 1960 is included in said Appendix A as Item 3. This amendment shows financial losses of employees on Roundhouse rosters up to that date from lay-offs due to loss of seniority rights.

The decision of the Jefferson Circuit Court was affirmed by the Kentucky Court of Appeals in an

Opinion rendered November 2, 1962. A copy of this Opinion is included in Appendix A as Item No. 4. The Opinion did not become effective until February 22, 1963, when the Kentucky Court of Appeals overruled the petition for rehearing. A copy of the Order Overruling said Petition for Rehearing is included in Appendix A as Item No. 5.

Neither the Opinion of the Chancellor nor the Opinion of the Court of Appeals of Kentucky has been published. Both Opinions refer to a decision by the National Railroad Adjustment Board entered June 30, 1958. A copy of said decision, or "Award" as it is called, is included in Appendix A as Item No. 6. Said Decision is published in Awards of the Second Division of the National Railroad Adjustment Board, Volume 27, pages 643-658.

JURISDICTION.

The Opinion and judgment of the Court of Appeals of Kentucky were entered November 2, 1962. The time for filing the Petition for Rehearing and the time for filing Responses were both extended. Both were filed within the extended periods. An Order was entered February 22, 1963 overruling the Petition for Rehearing. The Opinion and judgment, previously entered by the Court of Appeals, became effective then.

The jurisdiction of this Court is based on Title 28 U. S. Code, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

This action is brought for a declaration of rights. The petitioners seek this declaration because on February 17, 1957 they were, under collective bargaining agreements, entitled to, and had for years enjoyed, seniority rights on all mechanical jobs in the area known as the South Louisville Roundhouse area. The Collective Bargaining Agreements provided for such seniority rosters in specified geographical areas. The agreements have not been changed.

Petitioners should have filed this suit promptly after they were displaced on February 18, 1957. They followed regular procedure, however, and first applied to the employer, where they were denied any rights. Petitioners, and the other employees on the Roundhouse rosters, desired to continue their employment by the Louisville and Nashville Railroad. Yet, they found that any further work *in the area where they had been working* up through February 17, 1957, was denied to them, but was open to employees on the South Louisville Shops rosters, many of whom had substantially less seniority.

In an effort to settle the differences which had arisen between them and their employer, representatives of the 66 displaced employees suggested that the two groups of rosters be dovetailed. This would have combined the two areas, with no cost to the Railroad. This uniting request was also denied them, with the express approval of the representatives of the unions.

The Roundhouse employees then attempted to procure relief through the National Railroad Adjustment Board by requesting action upon two specific issues, one relating to the right to have the rosters dovetailed and the other a geographical question as to right to deprive the petitioners of seniority standing, when the same work is being done at the same place. The Board decided that the seniority rules of the collective bargaining agreement *provided only for standard point seniority* with no provision for dovetailing of seniority rights. On the other point the Board said there was no merit in the contention that the South Louisville Roundhouse had not in fact been closed, but made no finding on the right to work in the geographical area. This decision did not answer the question submitted as to seniority standing when the same work continued to be done as before in the same places. That question has not been determined by the Board.

The jobs, from and after February 18, 1957, were assigned to employees in the same crafts listed on different rosters. There has been a plain and flagrant discrimination, under the terms of the bargaining contracts against the employees on the Roundhouse rosters. The employees on the Roundhouse rosters have been displaced, and have been refused the right to return to work in the same area, both on February 18, 1957 and each day since that time. These 66 employees are today, and will be tomorrow, entitled, under the provisions of the bargaining agreements, to priority in jobs in the area which was known as the Roundhouse area at the time the collective bar-

gaining agreements were made between the unions and the Louisville and Nashville. They have been deprived of property rights under those agreements. This substituting for men on the Roundhouse rosters (who worked west of the fence) by men from other rosters (who worked east of the fence) was flagrant and arbitrary discrimination by the employer and the respondent unions.

In this action there are questions of discrimination presented as between petitioners on the one hand and both their employer and their respective bargaining agents, on the other hand.

The decision of the Jefferson Circuit Court and of the Kentucky Court of Appeals denied petitioners jurisdiction of this action merely because some of the same parties had been before the National Railroad Adjustment Board. Petitioners insist that the issue of discrimination before the Court in this action has not been heard or determined by that Board, and that that Board would not have had jurisdiction over the present issues.

The issues between petitioners and the respondents are:

1. If, under collective bargaining agreements, a carrier has two adjoining shops areas, each having separate seniority rosters for the four mechanical crafts involved in this action, and the bargaining agreements had no provisions as to uniting or combining shops or work areas, can the carrier and the bargaining agents legally agree to cut off all employees having seniority rights in one shop area, combining

two geographical areas into one shop operation, and continue shop work as before in both parts of the enlarged area using the seniority rosters and the employees for the other area only, thus arbitrarily discriminating against the employees cut off?

2. Does an application to the National Railroad Adjustment Board bar the trial of action for flagrant and arbitrary discrimination, not presented to said Board, of which issues said Board had no jurisdiction?

Petitioners respectfully insist that the carrier and the unions were both parties to the discrimination against them and, that their agreement in advance to the discrimination would have disqualified the members of that Board from hearing the discrimination issues. Petitioners further insist that the Court of Appeals of Kentucky has decided the questions as to jurisdiction of the Court to hear this action different from, and contrary to, applicable decisions by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The provisions of the Kentucky Constitution as to original jurisdiction of circuit courts are Sections 126 and 127. Copies of these sections are included in Appendix B to this petition as Items 1 and 2, respectively. The statute in Kentucky relating to jurisdiction of a circuit court is Section 23.010 Kentucky Revised Statutes. A copy of this section is included in Appendix B as Item 3.

The provision of the United States Constitution involved in this action is the Fourteenth Amendment to the U. S. Constitution, Section 1. A copy of said section is included in Appendix B as Item 4. The statutory provision of the U. S. Code involved in this action is Title 45, Section 153. A copy of parts of said section is included in said Appendix as Item 5.

STATEMENT OF THE CASE.

The facts of this case are simple. They appear in the Complaint-in-Equity, the Amended Complaint and the Exhibits filed with, or referred to, in these two pleadings. No actual pleadings were filed by any of the respondents. The action was decided on two motions to dismiss for lack of jurisdiction. The motion filed by the respondent Unions and its members included other grounds (R. 26, 27). The motion filed by the respondent Railroad Company included an alternative motion for summary judgment (R. 28, 30), with an affidavit with exhibits (R. 31-34).

Only the motions to dismiss for lack of jurisdiction were decided. They were sustained, so that the other motions and the affidavit are not before the Court. The three exhibits filed with the Scholl affidavit marked Exhibits "A", "B" and "C" included the entire record of the submission to the National Railroad Adjustment Board of a complaint by the same 66 employees for whom this action has been filed. In Paragraph 11 of the Amended Complaint in this action petitioners referred to said three exhibits and made them exhibits

with said pleading (R. 42-43). The record of the proceeding before the Adjustment Board is, therefore, a part of the record in this action.

Based on these two pleadings and these exhibits, we will outline the facts and the case as concisely as seems feasible.

Respondent Unions have, since about 1940, been the duly selected bargaining agents for their respective crafts with the respondent Railroad Company (R. 8-9). They negotiated the two collective contracts filed with the complaint in equity in this action as Exhibit "A" and Exhibit "B". Petitioners and the other mechanical employees whom they represent had worked under these agreements for many years, some of them from the time the agreements were first made. During all of the time up through February 17, 1957, they worked in the South Louisville Roundhouse area in pits and along tracks *west of a fence separating this Roundhouse shop area from* a separate area, formerly called the "Back Shop" area, now called *the South Louisville Shop area.* The Roundhouse itself had been torn down in 1956 or before.

In Exhibit "A" the rule as to seniority among the skilled crafts was provided in Rule 29.

This rule, which was in effect on February 17 and 18, 1957, and is still in effect, provided for seniority rosters for each of the four crafts involved in this action at South Louisville Shops and South Louisville Roundhouse. A copy of this rule is included in Ap-

pendix C as Item 1, the rule applicable to Reduction and Restoration of Forces is Rule 26. This provides for seniority governing on reduction of forces and in restoration. A copy of part of Rule 26(a) and part of Rule 26 (g) are included in Appendix C as Item 2 and 3 respectively.

In the agreement as to unskilled employees, Exhibit "B" with Complaint, provisions as to seniority are in Rules 9 and 10. These provide for seniority by districts. Copies of Rule 9(a) and of Rule 10(a) are included in Appendix C as Items 4 and 5. Provision as to force reductions and restorations are in Rule 13 and 14. Rule 13 provides for seniority controlling on reduction. Rule 14 as to recall provides for seniority controlling. Rule 13(a) and Rule 14(c) are included in Appendix C as Items 6 and 7 respectively.

In the record from the Jefferson Circuit Court are two photostatic copies of maps of the Shops areas, showing the long north south fence which separated the older Roundhouse area on the west, from the Back Shop area east of that fence.

Respondents have filed no pleadings, so the record contains no statement as to why in February, 1957 the carrier and the unions chose to make changes in personnel in the westerly shop area. The "Position of Carrier", as given to the Railroad Adjustment Board appears in Exhibit B filed with the Scholl affidavit. This statement includes the following:

> "*Position of Carrier:* Carrier denies that petitioners have been denied their seniority rights.

> Reduction in force was made consistent with the provisions of the applicable agreements and petitioners still retain the seniority rights held by them in the South Louisville roundhouse seniority district."

No change in the bargaining agreement was made then or since. No notice or advice was given either by the carrier or by any of the bargaining agents to any of the 66 employees working in the Roundhouse area, as to the holding of any conference between the carrier and bargaining agents, or as to any assent by the unions to displacement of personnel in the Roundhouse area. The Carrier's Statement of Facts merely says in the pleading it filed with the Adjustment Board:

> "*Carrier's Statement of Facts:* Under date of February 15, 1957, force reduction was made at the South Louisville, Kentucky, Roundhouse under the provisions of Rule 26 of the shopmen's skilled agreement and Rule 13 of the unskilled agreement (International Brotherhood of Firemen and Oilers), with all assigned employes cut off."

The first information which any of the 66 employees working in the Roundhouse area had, as to the Railroad Company's intentions, came on February 4th and 5th, when the Company posted notices as follows (R. 18-19):

"LOUISVILLE & NASHVILLE
RAILROAD CO.

Office of the Master Mechanic
So. Louisville, Ky., February 4th, 1957

BULLETIN No. 39

"TO ALL EMPLOYEES CONCERNED:

"Effective at the close of work of the third shift, February 17, 1957, all Mechanical operations of the South Louisville Roundhouse will be discontinued.

"All Roundhouse forces will be laid off in keeping with Rule 26 of the skilled employes agreement, and Rule 13 of the unskilled employes agreement.

"As a result of the foregoing, the following employes will be cut off in force reduction:

. . . . . .

"Employes laid off by reason of force reduction, desiring to retain seniority rights, should file their address as required under Rule 26(c) of the skilled employes agreement and Rule 14 of the unskilled employes agreement (IB of F&O).

J. A. PARRISH

jap llr"

The statement about force reduction, and about the lay-offs being in keeping with certain provisions, were misleading. Not one single job was discontinued. Immediately after these bulletins were posted, notices were given in the South Louisville Shops offering these exact jobs to the Railroad Company's employees in the same crafts, working under the same bargaining agreements, but listed on the South Louisville Shops rosters. All the jobs were given to men on the Shops rosters on February 18, 1957, if they wanted them.

Naturally the 66 men on the Roundhouse rosters promptly applied to the Unions to protect their rights in seniority in work in the Roundhouse area. The Union officials did nothing to protect the rights of these 66 men. The Unions even consented to saying that a contract which had given to the employees on the Roundhouse rosters seniority rights for almost 15 years, didn't any longer mean what it said—that it meant something different on February 18, 1957 from what it had meant on February 17, 1957.

The bargaining agents would not protest to the Railroad Company, or take any steps for the 66 men on the Roundhouse rosters, *but these 66 employees did*. In these negotiations they suggested the kind of provision which the carrier should have sought—use of both sets of rosters in both areas. When they were denied restoration of their jobs by the carrier, they still tried to work out a solution which would not only unite the areas but combine the rosters. The carrier refused this. Then the 66 displaced employees went to the Railroad Adjustment Board. It held that there was no contract provision as to dovetailing. On the other point, the Adjustment Board made no finding. It really was not in that Board's jurisdiction.

Petitioners and their associates desired to continue to work for the L. & N. Railroad Company. Many of them took work under brand new listing on the Shops rosters. All of them, however, are on the Roundhouse rosters. Under the contract, as it is written and exists today, petitioners and their associates had, and still have, the right to seniority in the

mechanical jobs in the Roundhouse area. That area is geographical. It is expressly designated in the agreements. *These 66 employees had seniority rights therein on February 17, 1957, on February 18, 1957, on February 18, 1960* when this action was filed and on *February 22, 1963* when the Court of Appeals judgment became effective, *and now.*

The Complaint in Equity for Declaration of Rights alleges that the actions of the Railroad Company are in violation of the union contracts, and arbitrarily deprives the 66 employees of their property rights, flagrantly discriminates against all 66 (R. 24). This same pleading alleges that the respondent unions, by failing to aid or represent these 66 employees, have violated the rights of these employees under the Railway Labor Act through the same discriminatory action (R. 24). No excuse for the Unions' acts appear, except that there were about 15 times as many employees in the other Shops. But that is even worse discrimination.

Both the Unions and the other respondents claimed in their motions to dismiss that this action can not be maintained because the Railway Labor Act gave to the National Railroad Adjustment Board, exclusive jurisdiction (p. 27, 28-39). The judgment upholds the plea as to exclusive jurisdiction, and dismisses the action against all respondents. This judgment then has the legal effect of denying a right even to a hearing on the constitutional rights of petitioners and their associates.

REASONS FOR GRANTING THE WRIT.

Respondent, Louisville and Nashville Railroad Company, desired to combine two adjoining shop areas. The same Master Mechanic already had supervision over both. Possibly uniting areas meant economy in management. The collective bargaining agreement called for separate seniority rights. The carrier could have sought an amendment to the contracts. Adjustment of rosters or compensatory arrangements for changes in seniority rights were feasible.

The employees in both Shop areas were represented by the same bargaining agents. Negotiating an amendment, with adjustment so as to continue the employment of all the then employees, ought to have been a most feasible and fair project. Such negotiation only required a definite purpose of fair treatment for both employer and both groups of employees. The men on the Roundhouse rosters were not only not dovetailed into combined rosters; the Roundhouse rosters themselves were pigeonholed.

I. DISCRIMINATION IN EMPLOYMENT BY CARRIER AND BARGAINING AGENTS.

A. Bargaining Agreements Created Contract Rights.

The collective bargaining agreements between the four craft unions and the Railroad Company had been in effect since 1942 or 1943. They created property rights to seniority in specified areas. Up to February 17, 1957 all parties recognized and respected these rights. The Court of Appeals of Kentucky has been

most careful in its protection of such contract rights under collective bargaining agreements. That Court has consistently prevented discrimination.

Gregg v. Starks, 188 Ky. 834, 224 S. W. 459;
Piercy v. L. & N. R. R. Co., 198 Ky. 477, 248 S. W. 1042;
McGregor v. L. & N. R. R. Co., 244 Ky. 696, 51 S. W. 2d 953.

A case decided by the Kentucky Court of Appeals in 1951, Hill v. U. P. Workers Union of America, 314 Ky. 791, 236 S. W. 2d 887, reaffirms this principle in these words (p. 798):

> "the union is the agent and servant of its members and membership does not exist for the benefit of the union;"

The Hill opinion states further as to the limitation upon the union's authority (p. 799):

> "Even within its own body, a trade union can employ no power as a means of oppression and injustice in respect of its members or deprive any of them in the form of contractual surrender or otherwise of their fundamental rights when the public interest will not be thereby served. Such assumed power cannot deprive any one of his constitutional right of liberty and property. Cameron v. International Alliance, etc., 118 N. J. Eq. 11, 176 A. 692, 97 A.L.R. 594. * * * *The right to earn a living property within the concept of constitutional rights, and a trade union* in the service of its own interests *may not deprive a person of such constitutional rights.* DeMille v.

American Federation of Radio Artists, 31 Cal. 2d 139, 187 P. 2d 769, 175 A.L.R. 382, certiorari denied, 333 U. S. 876, 68 S. Ct. 906, 92 L. Ed. 1152." (Italics supplied.)

Congress has provided for consolidation of railroads, a much greater physical and managerial alteration of facilities, but the Act of Congress authorizing such consolidations, Title 49, Section 5, par. 2 (c) requires the Interstate Commerce Commission to give weight to specific ideas, including "the interest of the carrier employees affected."

In United States, et al v. Lowden, et al., 308 U. S. 225, 60 S. Ct. 248, 84 L. Ed. 208 this Court held that the Interstate Commerce Commission in dealing with the lease of one railroad to another, in order to unite the facilities of the two railroads then in reorganization, the Commission could impose conditions regarding the employees affected.

In Interstate Commerce Commission v. Railway L. E. Association, 315 U. S. 373, 62 S. Ct. 717, 86 L. Ed. 904 this Court held that the same principle applied to the protection of affected employees in cases of abandonment of rail lines as well as in the cases of uniting railway lines.

In the case of Brotherhood of Maintenance of Way Employees, et al v. United States, 366 U. S. 169, 81 S. Ct. 913, 6 L. Ed. 2d 210 this Court held that the statute as to merger of lines requiring that employees for four years, not be placed in worse position, required that the employees be compensated, if not re-

tained in employment. Congress has given a great deal of study and attention to the protection of employees in cases of mergers or abandonment of railroads as being in the public interest. Where contracts exist, legislation should not be needed.

B. Procedure Followed in This Case.

The respondent, Louisville and Nashville Railroad Company, had used the two mechanical shops in its South Louisville Yards for over half a century. In January, 1957 the carrier wished to change this arrangement by combining the operation of the two mechanical shops. Such negotiations only required a recognition by all parties of existing rights and duties, and a willingness on the part of all concerned, for fair treatment to all.

What did happen to the seniority rights of the employees listed on the Roundhouse rosters in the South Louisville Yards? All were permanently displaced.

These sixty-six displaced persons, however still assert their seniority rights. In this action they ask for an adjudication that the union representatives who failed to take their part and the Carrier have all flagrantly and arbitrarily discriminated against each of these sixty-six men.

C. Rights of Action for Discrimination Under Bargaining Contracts.

1. JURISDICTION OF THE JEFFERSON CIRCUIT COURT.

On January 1, 1957 respondent Railroad Company complied with the provisions of the bargaining agreements in its mechanical shops at Louisville, Kentucky. It posted rosters in its various shop areas including the South Lonisville Roundhouse rosters. All sixty-six of the employees for whom this action has been filed, were named on those rosters. The rosters were still in effect and operated on January 28, 1957, but the Railroad Company had decided to unite the Roundhouse Shop and the South Louisville Shop for future operations.

As heretofore indicated, respondent could have negotiated with the men on the Roundhouse rosters, through their designated representatives, for the adjustment of rights on the uniting of the shops. This would naturally have required an amendment to each of the bargaining contracts to take care of such a situation. Of course this would not have been necessary, except for the designation of geographical areas for the seniority rights. Respondent Carrier in fact made no effort to negotiate for any amendment. It decided upon a course to follow in uniting the shops, which ignored the contract and required that some action be taken with reference to future assignment of jobs. The Carrier could have assigned the jobs to either of the shops areas or have agreed to combine the seniority rosters upon some basis agreeable between it and the employees by actual contract amendment.

The decision of the Carrier was to use the rosters for the South Louisville Shops. This caused the men on the Roundhouse rosters to be displaced immediately by other personnel and to lose all the seniority rights which they had accumulated and all benefits in the future of any accumulated seniority. They only have a right to jobs, if and when available.

The Carrier chose to violate the contracts, rather than to try to procure amendments thereto through normal procedure. The representatives of the unions, for some reason, sacrificed the seniority rights of the mechanical employees in the shop area having the smaller number of employees.

The Railway Labor Act recognizes the need or desire for alterations in bargaining agreements and provides for procedure between the unions and the carrier to work out such changes. Here the Carrier chose not to negotiate; it made its own decision on contract rights. That forced the employees to seek, in court, a declaration of rights as to who were thereafter entitled to the jobs in the Roundhouse area under the provisions of the bargaining agreement.

They need this declaration now just as they have ever since February 18, 1957. They have filed this action in a court of general jurisdiction to procure such declaration. The Rules of Procedure applicable in the Jefferson Circuit Court authorize it to hold hearings and make such declarations. That is what petitioners in this action are asking. As a matter of fact Kentucky Courts have, as previously mentioned, carefully protected the rights of employees de-

pending upon bargaining contracts. The Kentucky Courts have held specifically that in interpreting such agreements they will give such meaning as the parties themselves have given to it in operating or acting under it.

Piercy v. L. & N. R. R. Co., 198 Ky. 477, 248 S. W. 1042;

L. & N. R. R. Co. v. Bryant, 263 Ky. 578, 92 S. W. 2d 749.

In the Bryant case the Court says that the rules of practical construction by the parties, is particularly applicable to such agreements and that the Court was constrained to give controlling effect to this construction which had also been recognized by the lower Court.

Here the Carrier has wilfully violated its contracts with petitioners. It planned and secretly advised the union representatives of the "details of the force reduction". This so-called force reduction constituted a flagrant and arbitrary discrimination against these sixty-six displaced employees. The Jefferson Circuit Court has jurisdiction to determine the rights of the parties for violation of the contract and for flagrant and arbitrary discrimination. The Court did exercise such authority in the cases of:

Gregg v. Starks, 188 Ky. 834, 224 S. W. 459;

Piercy v. L. & N. R. R. Co., 198 Ky. 477, 248 S. W. 1042;

L. & N. v. Bryant, 263 Ky. 578, 92 S. W. 2d 749;

Hill v. U. P. Workers Union of America, 314 Ky. 791, 236 S. W. 2d 887.

2. THIS COURT'S DECISIONS HAVE PREVENTED JUST SUCH DISCRIMINATION.

In the January 28, 1957 conference between the carrier and the bargaining representatives, there apparently were no negotiations as to future job rights, due to the change in operating plans desired by the carrier. It ignored the employees on the Roundhouse rosters, in altering working conditions by displacing these employees. Negotiations for contract changes would have presented a major dispute relating to future working conditions.

Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886;

Brotherhood of Loc. Eng. v. Baltimore & Ohio R. Co., 83 S. Ct. 691, decided March 4, 1963.

The Burley opinion distinguishes such major disputes as those to provide for prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions, from minor disputes arising from grievances from past operation. The Opinion says in part (p. 723):

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."

No contract change has been made, however. The representatives of the unions failed to give any kind of representation to this group who were being permanently displaced. In good conscience these bargaining representatives should certainly have notified the men listed on those rosters, even if these bargaining representatives did not choose to try to protect the accrued seniority of these employees.

The carrier chose to make its own unilateral decision on the contract rights, with an arbitrary change as to interpretation of the contract. Even though it supposedly had secret approval thereof by the bargaining agents, the employees affected were entitled to some advice before bulletins were posted of action to deprive them of their property rights and to force them to seek some remedy in Court. Certainly the carrier and the union representatives have been guilty of flagrant discrimination against the petitioners and those they represent. The carrier without any notice to them bulletined complete lay offs and then complete displacement. The carrier and the unions gave to a contract one interpretation on February 17, 1957, and an entirely different interpretation the following day. This complete displacement of personnel having seniority in the designated area, with permanent loss by the employees displaced, of all their seniority rights in that area, was a severe blow to orderly railway operation.

In Hill v. U. P. Workers of America, et al., 314 Ky. 791, 236 S. W. 2d 887, which was a case with a controversy as to which union represented the em-

ployees, the following statement of law was made with reference to the authority of the union as a representative of the employees, (p. 798):

> "But the union may not act in any particular way so as to affect injuriously the personal rights of its members. A member does not have to submit to the determination of the union in any question involving his personal rights."

The unions realized that they had no authority to alter the bargaining agreements to affect seniority rights. They have never in this action stated their positions, but they were not authorized to surrender any accrued seniority rights. No one has claimed that they affirmatively did so. They only stood silent, or absented themselves, when the rights of these 66 displaced employees were involved.

However, their position of nonaction amounts to giving priority in job rights to other employees over the 66 having seniority by specific contract provisions.

The present action is one brought for a declaration of rights, where discrimination is charged both against the bargaining agents and the carrier. The decisions of this Court have in numerous cases held that discrimination against certain employees or classes of employees invalidates agreements or understandings between carriers and bargaining agents.

Steele v. L. & N. R. R. Co., et al., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 133;

Tunstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187;

Graham, et al., v. Brotherhood of Locomotive F. & E., 338 U. S. 323, 70 S. Ct. 14;

Conley, et al., v. Gibson, et al., 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80.

The Steele case involved discrimination against negro firemen on the L. & N. In 1940 the Brotherhood without informing the negro firemen or giving them an opportunity to be heard, gave notice to several railroads that the Brotherhood desire to amend the existing bargaining agreement. It did make two such agreements with the L. & N. in 1941. Then on April 8, 1941 all jobs in the pool in which Steele worked were declared vacant, and he was replaced by white firemen, junior to him, while he was given more arduous work. The Railroad Company was made a party, but the complaint sought a declaration of rights against the Brotherhood and an injunction so long as the discrimination continued.

The Supreme Court of Alabama held that the complaint stated no cause of action. This Court recognized that the contract changes discriminatorily restricted the negro firemen, and if the bargaining agents could make such contracts, Steele's constitutional rights would be involved. This Court then met the question of discriminatory contracts squarely and held that:

1. The Brotherhood, as statutory representative of the craft, had the exacting duty of protecting equally all those for whom it acts;

2. Congress did not undertake to authorize the bargaining representative to make discriminations.

3. The bargaining representative and its members may be enjoined from taking benefits of such discriminatory action.

4. Neither is the Railroad entitled to take the benefit of such prohibited contract.

The opinion then points out that the Railway Labor Act makes no reference to disputes between employees and their bargaining representative, and that the Adjustment Board could not give the entire relief sought here. Then the Opinion says (p. 207):

> "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which Courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction."
>
> * * * * * * *
>
> "We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty."

On the same day this Court also decided the case of Tunstall v. Brotherhood, etc., 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187. This action had been filed in a U. S. District Court case in Virginia, against the Railway

Company, the Brotherhood and others, for a declaratory judgment alleging discrimination against a negro fireman. The District Court dismissed for want of jurisdiction, and the Court of Appeals affirmed. This Court held that Tunstall was without adequate administrative remedies, and could resort to a court of equity for relief without attempting to secure administrative relief. This Court held that the complaint stated a cause of action and reversed the decision. This evidently involved the Railway Company as well as the Brotherhood.

In the case of Rolax v. Atlantic Coast Line Company, 186 F. 2d 473 (C.A. 4), the suit was against the Railroad Company, the Brotherhood and others to have declared void an agreement depriving Rolax and other negro firemen of seniority rights and other relief. The case was based on the facts and holdings by that Court in Board of Locomotive Firemen and Enginemen v. Tunstall, 163 F. 2d 289 (C. A. 4). The Rolax opinion discusses that Tunstall opinion at length and reversed the District Court's order of dismissal.

The opinion holds the amended bargaining agreement of February 18, 1941 discriminatory and void. Most of the opinion deals with Brotherhood action, but the Railroad Company insisted that the claim for damages against it be dismissed. The opinion says on that point (pp. 480-1):

> "As a result of the agreement of February 18, 1941, which we hold to be discriminatory and void, the railroad company has failed to accord to certain of the Negro firemen the seniority rights to which they are entitled and must respond in dam-

ages on that account. The void and discriminatory agreement which it entered into with the Brotherhood will no more protect it than it will protect the Brotherhood from liability for the loss occasioned to those who were injured thereby."

In the case of Graham, et al v. Brotherhood of Locomotive Firemen and Engineers, 338 U. S. 232, 70 S. Ct. 14, 94 L. Ed. 22, twenty one negro firemen sued 2 lodges of the Brotherhood, three railroads and certain officers of the lodges. This Court held that the cause of action pleaded was substantially the same as that in the Steele and Tunstall cases.

The Opinion holds that the exclusive statutory representative of an entire craft cannot bargain for the denial of equal employment and promotion opportunities to a part of the craft upon ground of race. It pointed out that the exclusive representation strips the minorities of all power of self protection and that, by abuse of its powers by perpetrating discriminatory employment practices, gives rise to a cause of action under federal law which federal Courts will entertain and will remedy by injunction.

The case of Teague v. Board of Locomotive Firemen and Enginemen, 127 F. 2d 56 (C. A. 6) was one where Teague, a Negro had been a fireman on the Gulf, Mobile and Northern Railway Company since March 15, 1917. He claimed that secret agreement had been made in 1938 between the Brotherhood and the Railroad Company, which gave preference to members of the Brotherhood (all white), and affected his seniority rights. He brought a bill in the U. S. Dis-

trict Court in Tennessee, alleging impairment of seniority rights by an unlawful agreement.

The Teague opinion says that the basic question was whether or not the Railway Labor Act conferred power on representatives to make a collective bargaining agreement destructive of vested rights of minority workers.

Teague tried the National Railroad Adjustment Board, but his claim was rejected "based on lack of jurisdiction". He based his claim in the U. S. Court on the bargaining agent acting under the Railway Labor Act. The opinion says that "there is nothing in the Railway Labor Act which authorizes their representatives to impair the personal or property rights of the employees." Unfortunately the above cases had not been decided, and the Court of Appeals decided that it had no jurisdiction. But the opinion says (p. 56):

> "If the allegations of the complaint are true, the appellant has a grievance, and one that is substantial and not merely colorable and fanciful. Somewhere must reside jurisdictional power to adjudicate it, and grant him and others of his class adequate relief. It is not within our province to say how or where. We have but to point out that he has mistakenly selected his forum. . . ."

The case of Conley, et al v. Gibson, et al., 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 contains facts very similar to the facts in the instant case, except that, as in most of the other cases involving discrimination, the plaintiffs were negroes. The Railroad with the blessing of the Unions purported to abolish 45 jobs

held by the Negro plaintiffs, which jobs were not abolished in fact but were filled by white men except in a few instances where several of the Negroes got their jobs back at a loss in seniority. This was done without alteration in the existing collective bargaining agreement.

The U. S. Court, for the Southern District of Texas supported by the Court of Appeals, for the Fifth Circuit, was of the opinion that, despite the ruling in the Steele case, and because the Conley situation involved the interpretation of the collective bargaining agreement, the Railway Labor Act, 45 U. S. C. A. 153 First (i), conferred exclusive jurisdiction of the matter in the National Railway Adjustment Board. This Court reversed the lower Courts, pointing out that the gist of the action was a discrimination claim between a group of employees and their bargaining agent over which the N.R.A.B. had no jurisdiction.

The L. & N. mechanical employees who worked for so many years in and around the South Louisville Roundhouse are equally as deserving of protection against arbitrary discrimination as colored firemen.

These decisions, including ones from this Court, show that the discrimination procured through unauthorized acts of the bargaining agents are void as to all affected parties. That is why the carriers have been included as parties in these actions. It is particularly applicable in this case, as the carrier initiated the contract violation and actively caused the discrimination. The Jefferson Circuit Court does not have any limitation of jurisdiction as the Court thought it had in the Teague case.

II. DOES APPLICATION TO NATIONAL RAILROAD ADJUSTMENT BOARD BAR COURT ACTION ON DISCRIMINATION?

We must divide the discussion of this subject immediately. The provisions as to the Adjustment Board relate solely to matters between the carrier and the carrier's employees.

A. Adjustment Board Has No Jurisdiction Over Union-Membership Controversies

The National Railroad Adjustment Act has no bearing whatever upon relationship between the respondent associations and brotherhoods and their members. Primarily the Act is intended to be for matters pending between the unions and the carrier. In this particular case both the carrier and the unions have aligned themselves against the petitioners. The respondent unions have attempted in this case to claim that consideration of the questions involved here with awards made, whether on the point involving issues in this action or not, operate as a bar to claims against the union.

There is no justification whatever for any such idea. The cases which this Court has determined with reference to the discrimination of the bargaining representatives against members of the craft or crafts which they represent, have pointed out the fact that the Adjustment Board does not in any way determine matters between the unions and the craft workers.

This absence of jurisdiction in the Adjustment Board as to any dispute between the employees and

their representative is directly pointed out in 323 U. S. 205 in the opinion in the case of Steele v. L. & N. R. R. Co., et al., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 133 and Tunstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187.

In the case of Conley v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 this Court said on pages 44-45:

> "The Adjustment Board has no power under Section 3 First (i) or any other provision of the Act to protect them from such discrimination."

This statement refers to the unfair discrimination by the bargaining agent against particular employees discussed in that opinion.

B. Jurisdiction of Adjustment Board Limited.

The only point which either the Jefferson Circuit Court or the Kentucky Court of Appeals considered with reference to this Act was the fact that respondents claimed that the controversy had been before the National Railroad Adjustment Board. That necessitates an approach to this subject by considering the statutory section which supposedly contaminates claimants and eliminates their otherwise valid causes of action. The particular Section is Title 45, Section 153, (m). It reads in part as follows:

> "A copy of the award shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

This language is plain enough. The finality provided relates to the award hence it is proper in this case to discuss the questions presented and the awards made.

Before and after they were laid off and displaced, the sixty-six mechanical employees on the Roundhouse rosters negotiated with the employer as to their rights. They asserted their claims to seniority in the Roundhouse area on an exclusive basis, but they made an approach for solution of the problem by making a most practical suggestion. As the South Louisville Shops employees were to be given all the jobs in both the specified areas, the petitioners or their representatives suggested to the carrier's representatives that the rosters be dovetailed so that all employees on all rosters could retain their seniority. Why this did not appeal to the carrier we do not know. Upon the failure to procure even this adjustment in the settlement of the controversy, the sixty-six employees filed a Complaint with the National Railroad Adjustment Board submitting the following questions:

> "(a) Under the respective agreements in force, can the Carrier deprive petitioners of their seniority standing under the pretext of discontinuing jobs and reducing force, when the same work is being done as before and in the same places?
>
> "(b) Are not petitioners entitled to be dovetailed in seniority with other employees of the South Louisville Shops, if their work continues to be assigned to said Shops?"

We do not think that the Adjustment Board had jurisdiction to decide either one of these questions. In the first place they related to future operations, not to a dispute over past conduct, and they related to the entire group of employees on the Roundhouse rosters as well as the employees on the South Louisville Shops rosters. The result of the submission to the Railway Adjustment Board demonstrates the point which we make. For some reason the Adjustment Board decided that it had jurisdiction in the case. This is directly contrary to what they decided in regard to the controversies which were brought before the Court of Appeals for the Sixth Circuit in Teague v. Locomotive Firemen and Enginemen, 127 F. 2d 56 (C. A. 6).

After assuming jurisdiction the Railway Adjustment Board made one decision and one finding of fact. It found that the seniority rule in the collective bargaining agreements provided only for standard point seniority. The finding was absolutely correct. The question of dovetailing was never claimed to have been included in the contract. The idea as to dovetailing was intended as a helpful suggestion toward solving an awkward situation which the carrier had created. The decision that the contract included only standard point seniority can be final and binding. That helps prove the basis for the discrimination made against petitioners.

The only other fact which the Adjustment Board seems to have actually determined is that they "find no merit in the contention of the complainants that the South Louisville Roundhouse was not in fact closed

or in the contention that the closing . . . was in bad faith or subterfuge.". As the geographical area was the basis for seniority, question (a) has not been answered; there is nothing final in that on the question of petitioners' seniority or of discrimination.

Even transfer of work to another point would not be a legal method of discarding the Roundhouse rosters. There are numerous cases where such transfers of work have been held to carry with it the transfer of seniority rights of the employees. On this point, the same principles would apply to railroad employees as to other crafts working under bargaining agreements.

> Metal Polishers, Buffers, Plasterers & Helpers Int. Union, Local 44 A.F.L.-C.I.O. v. Viking Equipment Co., 278 F. 2d 142 (C. A. 3);
> Zdanok v. Glidden Co., 228 F. 2d 99 (C. A. 2).

The Adjustment Board did not answer question (a) submitted to it. There certainly can be nothing final and binding about an unanswered question.

This question as to seniority in that geographical area related to the future operation of the Railroad Company's shops. It was not a dispute as to some past conduct. It related to the working conditions in the future day to day operation of the Railroad Company's shops. The Railroad Adjustment Board had no jurisdiction to consider this question, and their method of handling it demonstrates the fact that it did not belong in the jurisdiction of that Board.

The Railroad Company is very persistent in its attempt to prevent any court from considering the

question of discrimination. Discrimination was not the issue presented to the Board in question (a) and the Board has made no findings as to discrimination. This was not within its valid governmental jurisdiction.

The Opinion in the Steele case points out squarely that in a matter on which the unions and the carrier already agree, the Railway Labor Act does not furnish any administrative remedy.

The Opinion in Tunstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187 says as to the situation where the bargaining representative and the carrier have made an agreement which is discriminatory as to certain employees covered by the contract (p. 213):

> "[1] For the reasons stated in our opinion in the Steele case the Railway Act itself does not exclude the petitioner's cause of action from the consideration of the federal courts."

The right to a judicial review in cases where a minority in a union is not represented by a union has been recognized not only in the Steele, Tunstall and numerous other cases in this Court and in the other Federal Courts, but the same principles are recognized in the Court of Appeals for the Second Circuit in Rychlick v. Pennsylvania R. R. Co., 229 F. 2d 171 and in the Court of Appeals for the District of Columbia in Edwards v. Capital Air lines, et al., 176 F. 2d 755.

In this case the principles announced in the Steele case are applicable because no question arising out of

this discrimination really belonged within the jurisdiction of the Adjustment Board and the present question as to the right today or tomorrow as to seniority in the Roundhouse shops area is still a subject requiring Court determination. We believe that the decisions by this Court in the cases cited above on the question of discrimination likewise determine the right of the petitioners herein and those they represent to have a judicial declaration of rights in regard to the bargaining agreements which were in effect on February 18, 1957 and remain to this day with no changes therein. Petitioners and their associates lived with a sense of security in their seniority rights up to about February 17, 1957.

CONCLUSION.

Petitioners have failed to get a day in Court on their claim of flagrant and arbitrary discrimination as to job rights. For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

BLAKEY HELM,
JOSEPH B. HELM,
606 Louisville Trust Building,
Louisville 2, Kentucky.

Attorneys for Petitioners.

May 20, 1963.

APPENDIX A—ITEM No. 1

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, SECOND DIVISION

O. C. Lee, et al, - - - - - - - - Plaintiffs,

v.

Louisville & Nashville Railroad Company, et al., - - - - - - - - Defendants.

OPINION.

Prior to 1957 the L & N maintained two seniority rosters affecting plaintiffs and other members of the defendant Unions. One roster was at the South Louisville Roundhouse and the other at the South Louisville Shops, the "two points" being separated only by a fence. In 1957, the L & N discontinued at the Roundhouse the operations in which plaintiff employees worked, but offered the plaintiffs employment at the Shops. The bargaining representative and the L & N reached the conclusion that plaintiffs would have to go to the foot of the roster in the South Louisville Shops.

Plaintiffs felt themselves aggrieved by this method of placing them at the foot of the seniority roster and took the position that at least they should have been dovetailed in with the employees of the Shops. They pursued their grievance, being fully represented by counsel at the time, to the National Railroad Adjustment Board, which Board determined the issue adversely to plaintiffs.

In this action plaintiffs seek a declaration of rights against both the defendant Railroad Company and the

defendant Unions relative to a proper interpretation of the collective bargaining agreement pertaining to seniority rights; seek an accounting from the L. & N in favor of each plaintiff for wages allegedly lost; and a recovery against defendant Unions "for plaintiffs' expenses herein, and recovery against all defendants of costs and an appropriate fee for plaintiffs' counsel".

On motions to dismiss and for summary judgment, all defendants contend that the order of the National Railroad Adjustment Board is final, and that this Court has no jurisdiction of this action.

Numerous cases have held that the jurisdiction of the National Railroad Adjustment Board to interpret similar provisions of collective bargaining agreements between railroads and their unions is exclusive, *Penn. Railroad Co.* v. *Day*, 360 U. S. 548; 3 L. Ed. 2d 1422, and earlier cases. The *Day* case held that the jurisdiction was exclusive even though Day was a retired employee no longer in the active employ of the railroad. Other cases have held that when jurisdiction is exercised by the Board, its order becomes final (except in cases of a money award, not pertinent here). In *Union Pacific Railroad Co.* v. *Price*, 360 U. S. 601, 3 L. Ed. 2d 1460, it was not only held that the finding of the Board was final but also that the Board's order precluded a subsequent action at common law for damages.

Plaintiffs seek to avoid the effect of these two lines of cases by asserting, one, that even though they have already appealed to the Board and lost, that Board did not have jurisdiction of their action, and two, that the defendant unions in failing to take their side of this dispute have been guilty of discrimination against them.

Relative to the claim of discrimination, plaintiffs rely heavily on *Steel* v. *L & N Railroad Co.*, 323 U. S. 192, 89 L. Ed. 173, and *Conley* v. *Gibson*, 355 U. S. 41, 2 L. Ed.

2d 80. Both of these "discrimination" cases were specifically pitched on the theory that there was an "invidious" discrimination against the aggrieved members of the labor unions "because of race". In both cases the complaints were Negroes who were discriminated against in favor of white members of the same union. Here, we have no such situation.

Apparently the only "discrimination" we have in this case rests in the disappointment that plaintiffs encountered when the defendant Unions failed to agree with their position in this matter. Even if this amounted to discrimination, it is difficult to see how this discrimination has brought about the result before the National Railroad Adjustment Board, for plaintiffs were represented by able counsel before that Board. They did not rely upon the representation or failure to furnish representation by defendant Unions.

Moreover, the well-considered opinion of *Colbert* v. *Brotherhood of Railroad Trainmen*, 206 F. 2d 9, disposed of an almost identical argument involving seniority rights in which the complainants contended that a new agreement entered into by their unions was the "result of the arbitrary, capricious, and fraudulent" acts of the railroad and the unions. Rejecting an argument similar to the one here advanced, the Court quoted from *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 73 S. Ct. 681, saying:

> "The complete satisfaction of all who are represented is hardly to be expected."

The Circuit Court of Appeals held that the National Railroad Adjustment Board, not the Courts, was the proper tribunal to try an action similar to this.

In *Heppinstel* v. *System Federation No. 9*, 337 Mich. 251, 59 N. W. 2d 278, a conspiracy between Railroad Unions

and the Railroad was charged and an injunction and accounting was sought. There, like here, the claim was made that individual rights of the plaintiffs were sought to be enforced rather than a mere interpretation of the collective bargaining agreement. The State Court held that in order to reach the result sought by the plaintiffs there, an interpretation of the collective bargaining agreement had to be undertaken and, therefore, jurisdiction was in the Board and not the Courts.

So it is in this case. No matter what goal is attempted to be reached, whether it be a declaration of rights between the parties, an accounting for wages allegedly lost, or even a recovery of expenses against the defendant Union, the road to that goal necessarily involves an interpretation of the collective bargaining agreement.

Unions cannot discriminate against plaintiffs for some invidious reasons such as race or religion, but freedom from discrimination does not require that the union in every grievance agree with its aggrieved member. Justice requires that the aggrieved party have an opportunity to be heard before a proper tribunal. These requirements, however, have been fulfilled. Plaintiffs were well-represented, and have been heard by the tribunal which they initially sought out. Had they been successful before that tribunal, this litigation would never have ensued. Having been unsuccessful, both for the reasons that the Board's jurisdiction is exclusive and that its orders in matters of this nature are final, it follows that this Court is without jurisdiction to re-hear the same issue.

The contention that the Board to which plaintiffs first applied lacked jurisdiction is not sound. In *Colbert* v. *Brotherhood of Railroad Trainmen*, *supra*, the Court specifically held that an individual employee has the right to refer his grievance to the National Railroad Adjustment

Board. It is not necessary that the dispute be between a union and a railroad. An individual employee may thus present his grievance and so may a group of employees as was done in this case.

I conclude that this Court lacks jurisdiction to entertain this action.

This case will appear on my motion hour docket on Thursday, September 8th, at 9:30 A. M., at which time counsel may tender judgment in accordance with this opinion.

(s) Lampe, Judge.

August 25, 1960.

CC: Mr. Blakey Helm and Mr. Joseph Helm,
Mr. H. G. Breetz,
Mr. Joseph Stopher,
Mr. Richard R. Lyman,
Mr. Robert E. Hogan.

APPENDIX A—ITEM No. 2

Judgment entered in Court September 12, 1960 is as follows, to-wit:

JEFFERSON CIRCUIT COURT
Chancery Branch, Second Division
CR 47854

O. C. Lee, Et Al, - - - - - - - - Plaintiffs,

v.

Louisville & Nashville Railroad Company, Et Al., - - - - - Defendants.

JUDGMENT.

This action having been submitted to the Court on motion of defendant, Louisville & Nashville Railroad Company, to dismiss or for a summary judgment, and on motion of all other defendants to dismiss the complaint herein, and the Court having heard argument of counsel for all parties and having considered the briefs filed by counsel for all parties, and the Court being of the opinion that this Court lacks jurisdiction of the subject matter of this action and that defendants are entitled to a judgment in their favor dismissing the complaint herein, and the Court having handed down an opinion on August 25, 1960 in accordance with the Court's conclusion aforesaid, and which opinion is ordered made part of the record herein, and the Court being advised, it is now

Ordered and Adjudged that pursuant to the said opinion of the Court the complaint of plaintiffs, as amended;

herein should be and same is hereby dismissed, and that defendants shall have and recover from plaintiffs their costs herein expended, for which they may have execution.

Dated this 12th day of September, 1960.

(s) Stuart E. Lampe, Judge.

Counsel for Plaintiffs

(s) Joseph E. Stopher,
Counsel for Defendant, Louisville & Nashville Railroad Company,

(s) Richard R. Lyman,
and

(s) Robert E. Hogan,
Counsel for Defendants other than Louisville & Nashville Railroad Company.

APPENDIX A—ITEM No. 3

Amended Judgment entered in Court October 6, 1960 is as follows, towit:

JEFFERSON CIRCUIT COURT
Chancery Branch, Second Division
CR 47854

O. C. Lee, Et Al. - - - - - Plaintiffs.

v.

Louisville & Nashville Railroad Company, Et Al. - - - - - Defendants.

AMENDED JUDGMENT.

Judgment of this Court entered on the 12th day of September, 1960 is hereby amended to add the following paragraph:

It Is Hereby Ordered And Adjudged that the amount in controversy as to each of the plaintiffs is in excess of $2000.00, exclusive of interest and costs, and as to plaintiffs, K. L. Putman and Roy Fowle is in excess of $2,500.00 each, exclusive of interest and costs.

Entered this 6th day of October, 1960.

(s) Stuart E. Lampe, Judge.

Over objection of all defendants.

(s) S.E.L.

APPENDIX A—ITEM No. 4

COURT OF APPEALS OF KENTUCKY

RENDERED: NOVEMBER 2, 1962

K. L. Putman, Et Al., - - - - - - *Appellants,*

v.

Louisville & Nashville Railroad Company, Et Al., - - - - - - *Appellees.*

and

O. C. Lee, Et Al., - - - - - - *Appellants,*

v.

Louisville & Nashville Railroad Company, Et Al., - - - - - - *Appellees.*

Appeals from the Jefferson Circuit Court,
Stuart E. Lampe, Judge,
Chancery Branch, Second Division

OPINION OF THE COURT BY COMMISSIONER STANLEY—AFFIRMING.

(Not to be officially reported or cited as authority.)

The first styled case is an appeal as a matter of right by two individuals and as representatives of other employees of the Louisville and Nashville Railroad Company against the company and four labor unions to which they severally belonged, and, as well, certain officers of the unions. The second styled case is submitted on a motion for an appeal under KRS 21.080, before amendment, of parties making the same claims but for less than $2,500.

The motion is sustained and the cases are covered by one opinion.

On February 17, 1957, there was a reduction in forces by the railroad company which affected 66 men working in its South Louisville Roundhouse. The company had maintained two separate rosters for the Roundhouse and its shop employees, respectfully. The Roundhouse men affected by the force reduction were given the right to bid on and be awarded jobs in the shops. A controversy arose as to whether or not the Roundhouse employees should have their seniority rights maintained and be dovetailed into the roster of the shop employees. Representatives of the railroad company and of the unions, as bargaining agents, concluded that the Roundhouse employees should go at the foot of the shop roster. Those employees filed a grievance with the National Railroad Adjustment Board, an instrumentality set up under the Federal Railway Act of 1934, 45 U.S.C.A., § 151, et seq. After a hearing, that Board decided that the interpretation of the contracts and working rules of the railroad company and the respective unions was correct and dismissed the complaint.

Thereafter the Roundhouse craftsmen filed their complaint in the Jefferson Circuit Court, asking a declaration of rights in respect to the controversy and for an accounting for wages lost. The Court dismissed the same on a summary judgment for want of jurisdiction.

The federal statute provides for the submission to the Board of disputes between an employee or group of employees of an interstate carrier employer growing out of grievances or out of the interpretation or application of collective bargaining agreements. The Board has exclusive primary jurisdiction over such controversies, and its decision in this class of disputes is final. 45 U.S.C.A., § 153, First. The appellants seek here, as they did below, to avoid

the decision of the National Railway Adjustment Board on the ground that there was an arbitrary discrimination in the decision and because they have a constitutional right to appeal to the courts for relief, since the members of the Board were chosen by the railway companies and the railway employee unions, and, therefore, their decisions cannot be regarded as those of a fair and unprejudiced tribunal.

The Circuit Court, Judge Stuart E. Lampe sitting, filed an opinion in which he discussed the several contentions of the respective parties made before us and cited numerous authorities. We have carefully considered the several briefs and that opinion, and concur in and adopt the Circuit Court's opinion as the opinion of this Court without reciting it herein.

The judgment is affirmed.

Attorney for Appellants:
JOSEPH B. HELM,
Louisville, Kentucky.

Attorneys for Appellees:
JOSEPH E. STOPHER,
(BOEHL, STOPHER, GRAVES & DEINDOERFER)
H. G. BREETZ,
M. D. JONES,
ROBERT E. HOGAN,
all of Louisville, Kentucky,
RICHARD R. LYMAN,
Toledo 4, Ohio.

APPENDIX A—ITEM No. 5

ORDERS—KENTUCKY COURT OF APPEALS

WINTER TERM, FEBRAURY 22, 1963

Putman, Et Al., v. L. & N. Railroad Co. Et Al., Jefferson, Lee, Et Al., v. L. & N. Railroad Co., Et Al., Jefferson

The Court being sufficiently advised, it is considered that the petition of appellants for a rehearing be and the same is overruled in each case.

APPENDIX A—ITEM No. 6

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

AWARD No. 2899

Docket No. 2787-I 2-L&N-I-'58

Form 1

Parties to Dispute: J. D. Masden, et al.
Louisville and Nashville Railroad Co.

Dispute: Claim of Employes:

1. By Bulletin dated February 4, 1957, the Louisville & Nashville Railroad Co. (hereinafter referred to as the carrier) announced the discontinuance of all mechanical operations of its South Louisville Roundhouse, effective at the close of the third shift, February 17, 1957. Petitioning employes (hereinafter called petitioners) who prior to that date had been making inspections and running repairs to and servicing diesel locomotives, at points which for more than fifty years had been considered in the South Louisville Roundhouse district, were cut off in force re-

duction, purportedly under Rule 26 of the skilled employes' agreement and Rule 13 of the unskilled employes' agreement. Immediately following the discontinuance by the carrier of such operations, the jobs comprising such operations were bulletined by the carrier. Some of such jobs were bid in by other employes of the carrier junior in seniority to petitioners. The remaining jobs were by the carrier assigned either to junior employes or assigned to some of petitioners with a new seniority dating of February 18, 1957. In the reduction of forces and restoration of forces, petitioners' seniority was not protected as required by Rule 29 and Rule 26(g) of the skilled agreement and Rule 13 and Rule 14(c) of the unskilled agreement. Employes junior in seniority to petitioners (some of whom have been brought in from outlying points) are now doing their work. Petitioners have continued to do the same kind of work and in the same places as prior to February 18, 1957, but have been assigned to less desirable shifts and hours of employment and their seniority now stands only as of February 18, 1957, though many of them have more than thirty years' seniority.

2. Notwithstanding the carrier purportedly abandoned the South Louisville Roundhouse and discontinued all mechanical operations thereof, it continues to maintain seniority rosters for the Roundhouse district and petitioners have the same seniority standing thereon as prior to February 18, 1957. Nevertheless their employment since that date has been upon the basis of seniority in the South Louisville Shops as of February 18, 1957.

3. The carrier has refused to dovetail the seniority of petitioners in with the employes of the South Louisville Shops, as of that date, and the Unions, being the bargaining representatives of the crafts to which petitioners be-

long, have refused to request of the carrier the dovetailing of petitioners' seniority with said South Louisville Shop employes.

4. Questions upon which an award is sought

(a) Under the respective agreements in force, can the carrier deprive petitioners of their seniority standing under the pretext of discontinuing jobs and reducing force, when the same work is being done as before and in the same places?

(b) Are not petitioners entitled to be dovetailed in seniority with other employes of the South Louisville Shops, if their work continues to be assigned to said Shops?

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The grievance herein involves consequences flowing from the closing of the South Louisville Roundhouse, a separate seniority point of the carrier. The claimants in Docket No. 2787-I are employes of the South Louisville Roundhouse, and they advance the primary claim that they are entitled to be dovetailed in seniority with employes of the South Louisville Shops, another separate seniority point.

Seniority rights, including rights to have seniority dovetailed, are created or extended solely by contract or agree-

ment negotiated between the carrier and the duly accredited representatives of the respective craft or class of employes.

The record in Docket 2787-I discloses that no agreement provision for the dovetailing of seniority has been negotiated, or agreed to by the carrier and the duly accredited employe representatives. The seniority rules of the current collective agreement provide only for standard point seniority, which does not call for dovetailing of seniority when a point is closed or abolished.

We find no merit in the contention of the claimants that the South Louisville Roundhouse was not in fact closed or in the contention that the closing of the South Louisville Roundhouse was in bad faith or a subterfuge. When a point is closed, the work theretofore performed at that point is often transferred to another point, and from all that appears in the record, that is what happened in these circumstances.

The controlling agreement has not been violated.

AWARD

Claim denied.

National Railroad Adjustment Board
By Order of Second Division

Attest: Harry J. Passaman,
Executive Secretary.

Dated at Chicago, Illinois, this 30th day of June 1958.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

ITEM 1—Kentucky Constitution

§ 126. *Jurisdiction of Circuit Courts.* The jurisdiction of said Court shall be and remain as now established, hereby giving to the General Assembly the power to change it.

ITEM 2—Kentucky Constitution

§ 127. *Appeal from Circuit Court.* The right to appeal or sue out a writ of error shall remain as it now exists until altered by law, hereby giving to the General Assembly the power to change or modify said right.

ITEM 3—Kentucky Revised Statutes

23.010 *Court of record; original civil jurisdiction; judge conservator of the peace.* The Circuit Court is a Court of record. It has original jurisdiction of all matters, both in law and equity, of which jurisdiction is not exclusively delegated to some other tribunal, and jurisdiction in all cases where the title to land is in question, or in which it is sought to enforce a lien upon, or to subject, land by provisional remedy to the payment of debt. Each circuit judge is a conservator of the peace throughout the state.

ITEM 4—Fourteenth Amendment to U. S. Constitution

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ITEM 5—U. S. Code, Title 45

§ 153. *National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards*

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided— * * * *

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows: * * * *

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

* * * * * * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

* * * * * * *

APPENDIX C

EXCERPTS FROM BARGAINING CONTRACTS

ITEM 1—Excerpts from Exhibit "A" with Complaint in Equity

RULE 29.—SENIORITY

29(a) Seniority of each employe covered by this agreement will begin from the date and time the employe starts to work.

29(b) Seniority of employes in each craft covered by this agreement shall be confined to the point employed for those who perform work as per special rules of each craft in the various departments of the railroad as follows:

Machinists
Boilermakers
Sheet Metal Workers
Moulders
Electricians

Four subdivisions of the Carmen as follows:

Patternmakers
Upholsterers
Painters
Other Carmen
Coach Cleaners

At Louisville, Kentucky, seniority rosters for each craft will be maintained as follows:

Machinists
South Louisville Shops
South Louisville Roundhouse

Boilermakers
South Louisville Shops
South Louisville Roundhouse

Excerpts from Bargaining Contracts

Sheet Metal Workers

South Louisville Shops
South Louisville Roundhouse
Union Passenger Station

Electricians

South Louisville Shops
South Louisville Roundhouse
Union Passenger Station

Other Carmen

At South Louisville Shops the Air Break Room, Coach Carpenters, Painters, Tank Shop #12, Planing Mill, Cabinet Shop and Plating Shop; and Louisville Terminal Car Department, Roundhouse and Union Passenger Station seniority rosters will be maintained separately as heretofore.

29(c) Seniority rosters will be revised in January of each year. They will be posted and open to protest and proper correction for a period of 60 days from date of posting, which shall be shown thereon. After such time, the dating shown thereon shall govern for that period. Any seniority dating which has remained unchanged on 3 successive rosters shall not be open to further protest. The General Chairman shall be furnished 2 copies of all seriority rosters covering his respective craft, and the local chairman shall be furnished copies of his local craft's seniority rosters.

29(d) Wheel rollers, wheel pressmen and lve vat attendants, South Louisville Shops, shall be carried on one seriority roster, but separate from regular machinists helpers.

Excerpts from Bargaining Contracts

ITEM 2—Excerpts from Exhibit "A" with Complaint in Equity

RULE 26.—REDUCTION IN FORCES

26(a) When it becomes necessary to reduce expenses, the force at any point or in any department shall be reduced, seniority as per Rule 29 to govern; the employes affected to take the rate of the job to which they are assigned.

26(g) In the restoration of forces employes will be restored to service in accordance with their seniority, if available.

ITEM 3—Excerpts from Exhibit "B" with Complaint in Equity

RULE 9

Seniority Rosters

(a) Seniority rosters of employes will be compiled by seniority districts and will show the employe's dating in each rank to which he is entitled.

ITEM 4—Excerpts from Exhibit "B" with Complaint in Equity

RULE 10

Seniority Dating

(a) Seniority of employes will be computed from the date the employe's pay starts, provided he is employed on sixty days in a period of one year.

Excerpts from Bargaining Contracts

ITEM 5—Excerpts from Exhibit "B" with Complaint in Equity

RULE 13

Force Reductions

(a) When force is reduced, the senior employes in the seniority subdivision shall be retained, unless the Management and the Committee agree that a senior man is not qualified.

ITEM 6—Excerpts from Exhibit "B" with Complaint in Equity

RULE 14

Retaining Seniority for Recall

(c) In the restoration of forces laid-off men will be returned to the service in the order of their seniority.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 1120.

O. C. LEE, individually, and J. C. LITSEY, individually, and both as representatives of Machinists employed by Louisville and Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

A. B. LEMASTER, individually, and A. P. ROTH, individually, and both as representatives of Electricians employed by Louisville and Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

K. L. PUTMAN, individually, and ROY FOWLE, individually, and both as representatives of the Pipefitters employed by Louisville and Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957;

FRANK WELLS, individually, and JOSEPH M. GORDON, individually, and both as representatives of Laborers employed by Louisville and Nashville Railroad Company at its South Louisville Roundhouse on February 17, 1957, — *Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY; SYSTEM FEDERATION NO. 91 of the RAILWAY EMPLOYES DEPARTMENT, A.F.L.-C.I.O.;

HERMAN WEBB, President, System Federation No. 91; and

RAY ABNER, Secretary, System Federation No. 91; both as representatives of Said System Federation;

INTERNATIONAL ASSOCIATION OF MACHINISTS;

B. B. KIDWELL, General Chairman of said Association, and

JOHN W. HONADEL, President of Local No. 205 of said Association, both as representatives of said Brotherhood;

SHEETMETAL WORKERS INTERNATIONAL ASSOCIATION;

CLIFFORD MCCUBBIN, President of Local No. 445, of said Association;

EDWARD A. CONNELLY, Local Chairman of Local No. 445, of said Association, both as representatives of said Association;

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;

ERNEST L. RYAN, President of Local Unit No. 1353 of said Brotherhood; and

HERMAN WEBB, General Chairman of said Brotherhood, both as representatives of said Brotherhood;

INTERNATIONAL BROTHERHOOD OF FIREMEN, OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS;

RAY ABNER, General Chairman of said Association, and

HARRY SEARS, individually, President of Local No. 1004, both as representatives of said Association, - - *Respondents.*

Brief of Louisville and Nashville Railroad Company in Opposition to Petition For A Writ of Certiorari to the Court of Appeals of Kentucky.

OPINIONS BELOW.

The opinions below of the Jefferson Circuit Court and the Court of Appeals of Kentucky have not been officially reported. The opinion of the Jefferson Circuit Court is correctly reported in petitioners' appendix (1a-5a), as is the opinion of the Court of Appeals of Kentucky (9a-11a).

JURISDICTION OF THE COURT.

Jurisdiction of this Court to review the decision of the Court of Appeals of Kentucky rendered November 2, 1962, rehearing denied February 22, 1963, by means of a writ of certiorari is contained in 28 U. S. C. §1257(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

1. Does the Railway Labor Act preclude the maintenance of petitioners' suit brought specifically for a declaration of rights under collective bargaining agreements between the respondents, Louisville and Nashville Railroad Company and the Unions operating through System Federation No. 91 of the Railway Employes Department, A.F.L.-C.I.O., where, as here, petitioners have obtained an adverse award from the National Railroad Adjustment Board concerning the interpretation of the collective bargaining agreements?

2. Is petitioners' suit actionable as one based upon discrimination where, as here, the claimed discrimina-

tion by the Louisville and Nashville Railroad Company is based solely upon its alleged misinterpretation of the existing collective bargaining agreements, the precise issue decided adversely to petitioners by the National Railroad Adjustment Board?

STATUTES INVOLVED.

The pertinent provisions of the Railway Labor Act appear in the appendix, pp. 42b-43b, *infra*.

COUNTER-STATEMENT OF THE CASE.

The respondent, Louisville and Nashville Railroad Company (hereinafter called L&N), does not accept the petitioners' statement of the case. The L&N sets forth its own counter-statement of facts.

Petitioners filed this action against the L&N, System Federation No. 91 of the Railway Employes' Department, A.F.L.-C.I.O., several affiliated international and local labor organizations (hereinafter sometimes referred to as the "unions") and various officers of these labor organizations.

The named petitioners and those they purport to represent in this action are employees of the L&N (1b).[1] The labor organizations involved are the certified statutory collective bargaining representatives, under the Railway Labor Act (45 U.S.C. §151 *et seq.*), of the respective crafts and classes in which the petitioners are employed (1b, 7b-8b). Collective bargain-

[1]Numerals followed by letter "a" refer to petitioners' appendix. Numerals followed by letter "b" refer to pages of the L&N's appendix.

ing agreements were entered into between the L&N and the unions many years prior to 1957 covering "rates of pay, rules and working conditions" for the several crafts or classes of employees represented by the various unions, all in accordance with the provisions of the Railway Labor Act, and these agreements are still in effect (2b, 8b). These agreements contain, among other things, provisions relating to seniority of employees (2b-3b, 8b).

In accordance with the collective bargaining agreements, there has existed for many years on the L&N separate and distinct seniority districts for employees working in the South Louisville Roundhouse and for employees working in the South Louisville Shops (2b-3b, 8b). Separate seniority rosters were maintained by L&N for employees who worked in those separate seniority districts as set up in the agreements (3b-4b, 8b). The seniority of the employees at the South Louisville Roundhouse was purely geographical or what is known as point seniority, that is, their seniority did not entitle them to follow the work from one seniority district to another, and the Roundhouse district employees had no seniority right or right to work in the South Louisville Shops district (8b).

Effective at the close of work on February 17, 1957, all mechanical operations previously performed at the South Louisville Roundhouse were discontinued by the L&N and, as a result thereof, all employees engaged in the operations of the South Louisville Roundhouse were furloughed (4b, 8b). The South Louisville

Roundhouse has been torn down due to the entire dieselization of the railroad (18b, 22b).

It is apparent from the record that L&N interpreted the applicable collective bargaining agreements in effect between it and the unions as not authorizing the transfer of seniority rights of employees in the South Louisville Roundhouse district to the South Louisville Shops district. Prior to the making of this change in L&N's operations on February 18, 1957, the authorized representatives of all of the unions involved agreed with L&N's interpretation of the applicable collective bargaining agreements (4b-5b).

Some of the work that had been performed at the South Louisville Roundhouse prior to February 18, 1957 was, after that date, performed at the South Louisville Shops. Employees on the seniority roster of the South Louisville Shops were afforded the first opportunity to perform all the work necessary to be done at the South Louisville Shops, after which the employees on the roster of the South Louisville Roundhouse were afforded the opportunity to perform the remaining work at the South Louisville Shops with a seniority date of February 18, 1957 at that seniority point (9b). The South Louisville Roundhouse seniority rosters continue to be maintained so that, if mechanical operations are reestablished there, the employees on those rosters may perform such work at that seniority point in accordance with those seniority rosters (8b-9b).

The Roundhouse employees were dissatisfied because the seniority accumulated by them in the South

Louisville Roundhouse seniority district was not carried over by them into the seniority district of the South Louisville Shops and they protested to the railroad (5b, 9b). The right of the railroad to abolish the Roundhouse was conceded by petitioners, but they contended that it was violative of existing collective bargaining agreements not to "dovetail" or interweave their seniority with that of the employees whose names appeared on the seniority rosters of the South Louisville Shops on February 17, 1957, and that they had the right to work at the South Louisville Shops with the same seniority they enjoyed at the Roundhouse (9b, 26b). On April 23, 1957, the L&N, believing that its actions were strictly in accord with the applicable collective bargaining agreements, denied the claims of the petitioners (5b, 9b, 17b).

As required by the provisions of the Railway Labor Act (45 U. S. C. § 153), the petitioners submitted the dispute to the National Railroad Adjustment Board (5b, 9b, 11b-33b). Petitioners were represented by a well-qualified attorney in all their proceedings before the Adjustment Board. The contentions of the petitioners before the Second Division of the Adjustment Board are a part of the record here (11b-33b), as are the contentions of the L&N (33b-35b).

On June 30, 1958, the Adjustment Board issued its Award, No. 2899 in Docket No. 2787-I, which decided the dispute (11b-37b). The Board held (36b-37b):

> "Seniority rights, including rights to have seniority dovetailed, are created or extended solely

by contract or agreement negotiated between the carrier and the duly accredited representatives of the respective craft or class of employes.

"The record in Docket 2787-I discloses that no agreement provision for the dovetailing of seniority has been negotiated, or agreed to by the carrier and the duly accredited employe representatives. The seniority rules of the current collective agreement provide only for standard point seniority, which does not call for dovetailing of seniority when a point is closed or abolished.

"We find no merit in the contention of the claimants that the South Louisville Roundhouse was not in fact closed or in the contention that the closing of the South Louisville Roundhouse was in bad faith or a subterfuge. When a point is closed, the work theretofore performed at that point is often transferred to another point, and from all that appears in the record, that is what happened in these circumstances.

"The controlling agreement has not been violated."

On February 18, 1960, petitioners filed this action in the Jefferson Circuit Court in which they *specifically sought a declaration of their rights under the contracts between the L&N and the unions*, an accounting by the L&N for the wages and time lost by petitioners, and recovery of costs, expenses and counsel's fee in this proceeding. (5b-6b).

L&N filed its motion to dismiss the complaint or, in the alternative, a motion for summary judgment (6b-7b), and, in support thereof, L&N filed an affidavit,

with exhibits[1] thereto, executed by its Director of Personnel (7b-10b). The affidavit is uncontroverted.

On August 25, 1960, the Circuit Court handed down its written opinion in which it concluded that the Court lacked jurisdiction of the subject matter of the action (1a-5a). On September 12, 1960, judgment was entered dismissing the complaint, as amended (6a-7a). The judgment was amended October 6, 1960, for the sole purpose of adjudging the amounts in controversy (8a).

On November 2, 1962, the Court of Appeals of Kentucky affirmed the judgment of the Jefferson Circuit Court and adopted the written opinion of the Circuit Court (9a-11a). On February 22, 1963, the Court of Appeals of Kentucky denied a petition for rehearing (12a).

SUMMARY OF ARGUMENT.

The petition should be denied because the Jefferson Circuit Court and the Court of Appeals of Kentucky correctly decided the case and the decisions are not in conflict with applicable decisions of this Court.

Petitioners' entire argument is based upon erroneous statements throughout the petition that mechanical operations at the South Louisville Roundhouse

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[1]The exhibits consisted of the submission made by both sides to the National Railroad Adjustment Board and the Board's Award No. 2899. The body of the submission filed by petitioners and by the L&N are copied at length in Award No. 2899. The submission filed by the employees is copied in the award under the headings "Claim of Employes", "Questions upon which an Award is Sought", "Employes' Statement of Facts", and "Position of Employes". The submission of L&N is copied under the headings of "Carriers Statement of Facts" and "Position of Carrier". These submissions and Award No. 2899 are made exhibits to the complaint by the amended complaint (Pet. 12-13).

were not discontinued. The Circuit Court correctly found that such mechanical operations were discontinued by the L&N in 1957 (1a), and this finding of fact is amply supported by the record.

First, the National Railroad Adjustment Board by its Award No. 2899, rejected petitioners' contentions that the South Louisville Roundhouse had not been closed by the L&N (36b), and petitioners have conceded (Pet. 12-13) that Award No. 2899 is a part of the record in this action. Secondly, evidence of this fact is also contained in the uncontroverted affidavit of W. S. Scholl (8b). The uncontroverted affidavit is also properly a part of the record for, where jurisdiction depends upon a question of fact, the Court should ascertain the facts and its judgment thereon is conclusive unless reversed in a direct proceeding. *Stgother* v. *Day*, Ky., 279 S. W. 2d 785; *Collings* v. *Duff*, Ky., 283 S. W. 2d 479. In passing upon a motion to dismiss for want of jurisdiction, as distinguished from a motion to dismiss for failure to state a cause of action, the Court is not limited to an allegation in a complaint, but it may consider evidence, including affidavits. Please see *Ramires & Feraud Chili Co.* v. *Las Palmas Food Co.*, 146 F. Supp. 594 (S.D. Calif.), aff'd. 245 F. 2d 874 (C.A. 9), cert. den. 355 U. S. 927; *Land* v. *Dollar*, 330 U. S. 731. Thirdly, petitioners' motion (37b-38b), by which they sought to have the Jefferson Circuit Court change its finding and to enter a finding that the Roundhouse had not been closed, was overruled (38b). The Roundhouse has even been torn down (22b), and petitioners have

conceded this much to be true (Pet. 13). In fact, in a supplemental brief filed in the Court of Appeals of Kentucky, counsel for petitioners, referring specifically to the South Louisville Roundhouse, stated (p. 8): "There is not even a side track left in that area where the men on the Roundhouse rosters could work."

In this action, the petitioners seek only a declaration concerning their seniority rights under the collective bargaining agreements in effect between the L&N and Unions (5b-6b). Petitioners were never discharged by the L&N (1b). There being no dispute concerning the relief sought and the status of petitioners as employees of the L&N, the law is well settled by this Court that the present suit is precluded by the Railway Labor Act (45 U.S.C. §153, *et seq.*) The Railway Labor Act vests exclusive primary jurisdiction in the National Railroad Adjustment Board to decide disputes involving the interpretation of collective bargaining agreements in the railroad industry. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239; *Order of Ry. Conductors* v. *Southern Ry. Co.*, 339 U. S. 255; *Pennsylvania R. Co.* v. *Day*, 360 U. S. 548.

Petitioners cite four Kentucky cases in support of their contention that the state court has jurisdiction to interpret the collective bargaining agreements: *Gregg* v. *Starks*, 188 Ky. 834, 224 S. W. 459 (1920); *Piercy* v. *Louisville & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923); *McGregor* v. *Louisville & N. R. Co.*, 244 Ky. 696, 51 S. W. 2d 953 (1932), and *Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. 2d 749 (1936).

The first three of the above cases were decided prior to the enactment of the 1934 amendments to the Railway Labor Act and all of them were decided prior to this Court's decision in the *Slocum* case, *supra*.

Numerous decisions from state and federal courts have applied the principle of the exclusive jurisdiction of the Adjustment Board announced by the Supreme Court in the *Slocum* and related cases. Please see, *e.g.*, *Emmons* v. *Grand International Brotherhood, Etc.*, 340 Mich. 368, 65 N. W. 2d 736; *Brennon* v. *Delaware, L. & W. Railroad*, 303 N. Y. 411, 103 N. E. 2d 532, cert. den. 343 U. S. 977; *Isgett* v. *Atlantic Coast Line R. Co.*, 223 S. C. 56, 74 S. E. 2d 220; *Gainey* v. *Bro. Ry. Clerks*, 177 F. Supp. 421 (E.D. Pa.), affirmed 275 F. 2d 342 (CA 3), cert. den. 363 U. S. 811; *Spires* v. *Southern Ry. Co.*, 204 F. 2d 453 (CA 4); *Fingar* v. *Seaboard Air Line*, 277 F. 2d 698 (CA 5); *Broady* v. *Illinois Central R. Co.*, 191 F. 2d 73 (C.A. 7), cert. den. 342 U. S. 897; *Rose* v. *Great Northern Ry.*, 268 F. 2d 674 (C.A. 8); *Colbert* v. *Brotherhood of R. Trainmen*, 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924.

Award No. 2899 of the Adjustment Board, not being a money award, is final and binding upon the employees and precludes the present suit. 45 U.S.C. § 153 First (m); *Union Pacific R. Co.* v. *Price*, 360 U. S. 601. Petitioners' suit falls within neither of the two exceptions involving judicial review announced by this Court in the *Price* case: It is not an action instituted in federal court under 45 U.S.C. §153 First (p) to enforce an award. Neither is petitioners'

suit a direct attack upon the Board's award. Where it is claimed that the proceedings before the Board was a denial of due process of law, the award is subject to attack but, in such instances, the Board is an indispensable party to the suit. *Ellerd* v. *Southern Pacific R. Co.*, 241 F. 2d 541 (C.A. 7), cited with approval by this Court in the *Price* case; *Finlin* v. *Pennsylvania R. Co.*, 288 F. 2d 826 (C.A. 3); *Morrissette* v. *Chicago, B. & Q. R. Co.*, 299 F. 2d 502 (C.A. 7), cert. den. 369 U. S. 874.

Petitioners' attempt to evade the principles announced in *Slocum* v. *Delaware, L. & W. R. Co.*, *supra*, *Pennsylvania R. Co.* v. *Day*, *supra*, and *Union Pacific R. Co.* v. *Price*, *supra*, by the argument that they are victims of discrimination. They rely upon such racial-discrimination cases as *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, none of which is remotely apposite to the present case. Those cases involved *hostile* and *invidious* discrimination—a discrimination based solely upon racial distinction. While we do not contend that hostile discrimination is limited to racial discrimination, we do insist that petitioners cannot avoid the principles so clearly announced by this Court in such cases as *Slocum*, *Day* and *Price* and obtain another interpretation of the existing collective bargaining agreements by the simple expedient of placing somewhere in the complaint a *naked* conclusion of discrimination.

The specific relief sought by petitioners is a declaration of rights as against the L&N, *under the contracts between the L&N and the Unions*, a declara-

tion of rights as between the petitioners and the Unions *as to the interpretation* of said contracts, an accounting for wages allegedly lost *due to L&N's allegedly erroneous interpretation of the agreements,* and recovery of costs, expenses and counsel's fee (5b-6b). The affidavits filed by petitioners (39b-41b) reveal most clearly that ". . . the action is one for a declaration of rights against defendant railroad and unions as to the interpretation of a contract as to plaintiff's and other's seniority rights and for an accounting for wages lost because of wrongful loss of seniority." Insofar as discrimination is concerned, the pleadings allege a mere conclusion of law and do not set forth any facts even tending to show arbitrary, capricious or discriminatory conduct on the part of respondents. Indeed, in their complaint (1b), petitioners *affirmatively* allege that they differ with the L&N ". . . only as to the interpretation of contracts as will hereinafter appear." It is anomalous that petitioners have asserted that the claimed discrimination is based upon L&N's alleged misinterpretation of existing collective bargaining agreements, the precise issue decided adversely to petitioners by the Adjustment Board, which Board, this Court held in the *Slocum* case, has exclusive primary jurisdiction to interpret such agreements, and whose decisions involving such an award as this are final and binding. *Union Pacific R. Co. v. Price, supra.* To adopt petitioners' theory of discrimination would be to destroy the principles of the *Slocum* and *Price* cases.

The *Steele* case and other discrimination cases cited by petitioners involve instances where employees were seeking to have a collective bargaining agreement declared *invalid*. It is true that the Adjustment Board has no jurisdiction to determine the validity of an agreement—its statutory function is that of interpreting such agreements. In the *Steele* case this Court was careful to point out that there were no issues ". . . as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board." (323 U. S. 205). Please see, also, *Brotherhood of R. Trainmen* v. *Howard*, 343 U. S. 768, 774. Petitioners here do not seek to have any collective bargaining agreements declared invalid. To the contrary, they rely, as they must, upon the existing agreements and seek only relief involving their interpretation.

Not only have the petitioners failed to allege any facts even tending to show that employees similarly situated were accorded unequal rights, but the pleadings, *affirmatively* reveal (3b-4b) that under the applicable collective bargaining agreements *separate* seniority rosters were required to be maintained and were maintained for Roundhouse employees and the employees of the South Louisville Shops, *a relevant distinction between these two groups of employees based upon the place of work*. Thus, it is conceded by petitioners (Pet. 4, 13) that the seniority rights of the Roundhouse employees are not the same as the seniority rights of employees at the South Louisville

Shops. Petitioners also concede (Pet. 38) that the existing agreements provided only for only standard *point seniority. Therein lies the relevant distinction between these two groups of employees.* There is nothing unlawful about the agreements which create the point seniority system and make the distinction, as here, between the seniority rights of the petitioners and the seniority rights of employees of the South Louisville Shops. *Ford Motor Co.* v. *Huffman*, 345 U. S. 330.

The law is well established, from decisions of both state and federal courts, that merely by naming a labor union as a defendant and by adding *naked* charges of discrimination, fraud or collusion, an employee does not vest jurisdiction in the courts to determine a controversy which depends upon the interpretation of a collective bargaining agreement between a railroad and a labor union. Please see, *e.g.*, *Hippensteel* v. *System Federation No. 9*, 337 Mich. 251, 59 N. W. 2d 278 (1953); *Emmons* v. *Grand International Brotherhood, Etc.*, 340 Mich. 368, 65 N. W. 2d 736 (1954); *Bennett* v. *Progress Lodge 992; Etc.*, 159 F. Supp. 93 (D.C. Mass.); *Rose* v. *Great Northern Railway Company*, 268 F. 2d 674 (C.A. 8); and *Colbert* v. *Brotherhood of R. Trainmen*, 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924. This should be especially true where, as here, the pleadings *affirmatively* reveal a relevant distinction between the seniority rights of the two groups of employees based upon their place of work.

Other arguments advanced by petitioners to escape the impact of the Board's exclusive jurisdiction and its adverse award are completely lacking in merit.

The dispute is not a major dispute, as contended by petitioners. It involves nothing more than the interpretation of existing collective bargaining agreements which constitutes a minor dispute. *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711; *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30.

Nor is there any merit in petitioners' contention that the existing collective bargaining agreements precluded the L&N from discontinuing its mechanical operations at the South Louisville Roundhouse. It is apparent from its findings (36b-37b) that the Adjustment Board was aware that the L&N had discontinued such mechanical operations and the Board held that the agreements had not been violated (37b). In their submission to the Board, petitioners correctly conceded (26b) that the L&N had the right to abolish the Roundhouse. Please *cf. Street, Electric Ry. & Motor Coach Employees* v. *Greyhound Corp.*, 231 F. 2d 585 (C.A. 5); *United States Steel Corp.* v. *Nichols*, 229 F. 2d 396 (C.A. 6), cert. den. 351 U. S. 950; *New York Central R. Co.* v. *Brotherhood of R. Trainmen*, 140 F. Supp. 273 (N.D. Ohio), aff'd. 246 F. 2d 115 (C.A. 6), cert. den. 355 U. S. 877.

Petitioners appear to have erroneously assumed (Pet. 21-22) that the L&N could not lawfully discontinue its mechanical operations at the Roundhouse without the approval of the Interstate Commerce Commission for they rely upon Section 5(2)(*e*) of the

Interstate Commerce Act (49 U.S.C. Sec. 5(2)(c)) and cases involving that Act. Their reliance upon such authority is misplaced. Section 5(2)(c) applies only to mergers, consolidations and acquisitions *involving two or more carriers.* The L&N was not prohibited by any law from discontinuing its mechanical operations at the Roundhouse. It was strictly an internal change in its mechanical operations within the exercise of managerial prerogative and discretion.

Petitioners contend that their seniority rights are property rights under the Fourteenth Amendment to the Constitution of the United States and that the alleged impairment of their seniority rights presents a Constitutional question. Petitioners misconceive the nature of their seniority rights. There is no constitutional or statutory basis for their seniority rights. Seniority among employees is wholly contractual. *McMullans* v. *Kansas, Oklahoma & Gulf Rwy. Co.*, 229 F. 2d 50 (C.A. 10), cert. den. 351 U. S. 918; *Elder* v. *New York Cent. R. Co.*, 152 F. 2d 361 (C.A. 6); *Napier* v. *System Federation No. 91*, 127 F. Supp. 874 (W.D. Ky.); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Colbert* v. *Brotherhood of R. Trainmen*, 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924. It necessarily follows that the alleged violation of petitioners' seniority rights must be determined by the interpretation of the collective bargaining agreements, and this Court has clearly held that the Adjustment Board has *exclusive* primary jurisdiction to interpret collective bargaining agreements between a railroad and its employees.

Petitioners rely upon *Metal Polishers, Etc., Union* v. *Viking Equipment Co.*, 278 F. 2d 142 (C.A. 3) and *Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (C.A. 2), cert. den. 368 U. S. 814, and contend that the transfer of work carries with it the transfer of seniority rights. However, these cases did not involve the Railway Labor Act and there is a vast distinction in the *procedure* for the resolution of disputes between that Act and the National Labor Relations Act or the Labor Management Relations Act. *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30, 31-32, note 2. Moreover, those cases are clearly distinguishable from petitioners' case on the *merits* for precisely the same reason given by Judge Miller in *Oddie* v. *Ross Gear and Tool Co.*, 305 F. 2d 143 (C.A. 6), cert. den. 371 U. S. 941. Petitioners' seniority was acquired at and limited to the Roundhouse and the Adjustment Board properly held (36b-37b) that petitioners could not transfer their seniority to the South Louisville Shops, another separate seniority point.

The decision below is correct. No unsettled question of importance is actually presented, and there is no conflict of decisions. Accordingly, a writ of certiorari should not issue.

ARGUMENT.

REASONS FOR DENYING THE WRIT.

The Petition for a Writ of Certiorari Should Be Denied Because the Jefferson Circuit Court and the Court of Appeals of Kentucky Correctly Decided the Case and the Decisions Are Not in Conflict With Applicable Decisions of This Court.

It should be pointed out *in limine* that petitioners' entire argument is based upon the erroneous contention that the mechanical operations at the South Louisville Roundhouse were not discontinued. It is important to review the record in some detail in connection with such contention before discussing the basic issues of law involved.

The Jefferson Circuit Court expressly found that mechanical operations at the South Louisville Roundhouse were discontinued by the L&N in 1957 (1a):

> ". . . In 1957, the L&N discontinued at the Roundhouse the operations in which plaintiff employees worked, but offered the plaintiffs employment at the [South Louisville] Shops. The bargaining representative and the L&N reached the conclusion that plaintiffs would have to go to the foot of the roster in the South Louisville Shops."

The above finding by the Jefferson Circuit Court is amply supported by the record, as we proceed now to show.

First, the petitioners had contended before the Adjustment Board that the mechanical operations at

the South Louisville Roundhouse were not discontinued, but the Board rejected their contentions as shown by the following portions of its Award No. 2899 (36b):

> "The grievance herein involves consequences flowing from the closing of the South Louisville Roundhouse, a separate seniority point of the carrier. . . ."
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> * * * * * * *
>
> "We find no merit in the contention of the claimants that the South Louisville Roundhouse was not in fact closed or in the contention that the closing of the South Louisville Roundhouse was in bad faith or a subterfuge. . . ."

The Board's finding that the South Louisville Roundhouse was closed is final and binding.[1]

Secondly, in the uncontroverted affidavit of W. S. Scholl, it is stated (8b):

> "Affiant further states that on or about February 17, 1957, all mechanical operations previously performed at the South Louisville Roundhouse were discontinued and, as a result thereof, it was necessary to furlough all employees engaged in the operations of said South Louisville Roundhouse."

Petitioners seek to avoid the effect of the above uncontroverted affidavit by contending (Pet. 12-13) that, since the Circuit Court dismissed for lack of

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[1]Please see 45 U.S.C. §153 First (m); *Union Pacific R. Co.* v. *Price*, 360 U. S. 601. This is dealth with at pp. 32-38, *infra*.

jurisdiction, no facts may properly be considered except those stated in the complaint and amended complaint. We submit that the uncontroverted affidavit is properly a part of the record where, as here, the issue is one involving the jurisdiction of the lower Court.

Any Court, even *sua sponte*, has judicial power to determine its own jurisdiction in a particular case, and where such jurisdiction depends upon a question of fact, the Court should ascertain that fact; and its judgment ascertaining the fact is conclusive on the question of jurisdiction unless reversed in a direct proceeding. *Strother* v. *Day*, Ky., 279 S. W. 2d 785; *Collings* v. *Duff*, Ky., 283 S. W. 2d 179. In passing upon a motion to dismiss for want of jurisdiction, as distinguished from a motion to dismiss for failure to state a cause of action, the Court is not limited to allegations of a complaint but may properly consider proof *aliunde* the allegations of the complaint, including affidavits. Please see *Ramires & Feraud Chili Co.* v. *Las Palmas Food Co.*, 146 F. Supp. 594 (S.D. Calif.), aff'd. 245 F. 2d 874 (C.A. 9), cert. den. 355 U. S. 927; *Land* v. *Dollar*, 330 U. S. 731.

After the Jefferson Circuit Court had rendered its opinion in which it was expressly found that the mechanical operations at the South Louisville Roundhouse had been discontinued by the L&N in 1957, petitioners filed a motion to amend the Court's opinion (37b) and sought to have the Court make a finding that mechanical operations were not discontinued at

the South Louisville Roundhouse (38b). This motion of petitioners was overruled (38b).

The South Louisville Roundhouse has even been torn down (22b) and petitioners have even conceded this much to be true (Pet. 13). In fact, in a supplemental brief filed by petitioners in the Court of Appeals of Kentucky, they not only admitted that the South Louisville Roundhouse has been torn down but, referring specifically to the South Louisville Roundhouse area, counsel for petitioners stated (p. 8): "There is not even a side track left in that area where the men on the Roundhouse roster could work."

The Court of Appeals of Kentucky concurred in and expressly adopted the Circuit Court's opinion as the opinion of the Court of Appeals.[1]

There can be no question but that the petitioners have based their entire petition upon a factual basis which is contrary to findings made by the Jefferson Circuit Court, which findings are amply supported by the record. Moreover, petitioners previously had made the same allegations of facts before the National Railroad Adjustment Board (13b-25b) and they were expressly rejected by that Board (36b).

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[1]The opinion of the Court of Appeals was one rendered pursuant to its rule 1.310(b) which provides:

> "If the issues presented in a case do not involve any new or substantial point of law or any question of public importance the Court may direct that the opinion not be reported officially or cited as authority, which direction will be stated in the opinion and shall be noted by the Clerk on the docket. The opinions in such cases will not detail the facts and will dispose of the issues in a summary manner."

The Railway Labor Act Vests in the National Railroad Adjustment Board Exclusive Primary Jurisdiction to Decide Disputes Involving the Interpretation of Collective Bargaining Agreements in the Railroad Industry.

The complaint and the amended complaint *seek only a declaration of rights under the agreements between the L&N and the unions* representing the various crafts or classes in which petitioners are employed, an accounting for wages allegedly lost due to L&N's interpretation of the agreements, and recovery of costs, expenses and counsel's fee.[1] Petitioners and those they purport to represent in this proceeding are employees of the L&N, that is, the petitioners have not been discharged from the service of the L&N and the relationship of employer and employees continues to exist. Such being true, we submit that the law has been settled beyond dispute by this Court that the present suit is precluded by the Railway Labor Act (45 U.S.C. §153).

In 1934, the Congress of the United States amended the Railway Labor Act and, among other things, provided for a tribunal, known as the National Railroad Adjustment Board, for the specific purpose of deciding disputes arising out of the interpretation or application of collective bargaining agreements in the railroad industry. 45 U.S.C. §153 First (i) describes the type of disputes to be handled by the Adjustment Board as follows:

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[1]The nature of this suit and the specific relief sought are discussed in more detail at pp. 50-51, *infra*.

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

In proceedings before this Board, the "parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect." 45 U.S.C. § 153 First (j).

The only judicial proceeding *expressly* authorized by the Act after the rendering of an award by the Board is an enforcement suit in a United States District Court. 45 U.S.C. Supp. § 153 First (p).

After the enactment of the 1934 Amendments to the Railway Labor Act, questions arose as to what extent, if any, the 1934 Act affected the jurisdiction of the courts, both state and federal, to decide disputes between employees and railroads subject to the Act involving the interpretation or application of their collective bargaining agreements. In 1941, this Court decided *Moore v. Illinois Central R. Co.*, 312 U.S. 630, a case involving an alleged wrongful discharge of an employee. In the *Moore* case, this Court held that the

Railway Labor Act, as amended in 1934, did not preclude a common-law action in a state court for damages for wrongful discharge. It then appeared that the jurisdiction of courts was unaffected by the Railway Labor Act. However, the rule of the *Moore* case has been given a very limited scope, and subsequent decisions of this Court have expressly so stated.

One limitation upon the scope of the *Moore* case is set out in *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653. There, this Court held that a common-law action for damages for unlawful discharge was properly dismissed because the applicable State law requiring the exhaustion of administrative remedies had not been complied with.[1]

On April 10, 1950, this Court handed down two opinions involving the jurisdiction of state courts to interpret collective bargaining agreements in the railroad industry. In *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, the railroad had instituted a declaratory-judgment action in a New York state court for interpretation of collective bargaining agreements between the railroad and two labor unions. The state court interpreted the agreements and entered a declaratory judgment which was affirmed by the Appellate Divi-

[1] In the case now before the Court, petitioners allege that they all are employees of the L&N (1b); thus, their case is one not involving an alleged wrongful discharge. Moreover, Kentucky, unlike the Mississippi Court in *Moore* v. *Illinois Central R. Co.*, *supra*, requires the exhaustion of administrative remedies. Please see, for example, *Norfolk & W. Ry. Co.* v. *Harris*, 260 Ky. 132, 84 S. W. 2d 69, and *Tharp* v. *Louisville & N. R. Co., et al.*, 307 Ky. 322, 210 S. W. 2d 954.

sion and the Court of Appeals of New York. On appeal to this Court, the question presented for decision was stated as follows:

> "Section 3 of the Railway Labor Act confers jurisdiction on the National Railroad Adjustment Board to hold hearings, make findings, and enter awards in all disputes between carriers and their employees 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . .' The question presented is whether state courts have power to adjudicate disputes involving such interpretations when the Adjustment Board has not acted." (339 U. S. 240)

Thereafter, the Court held:

> "In this case the dispute concerned interpretation of an existing bargaining agreement. . . . in 1934 Congress, with the support of both unions and railroads, passed an amendment which directly created a national Adjustment Board composed of representatives of railroads and unions. 48 Stat. 1189-1193. The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its Congressionally imposed functions. . . .
>
> "The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in *Order of Conductors* v. *Pitney*,

supra [326 U. S. 561]. There we held, in a case remarkably similar to the one before us now, that the federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents. . . .' Our ground for this holding was that the court 'should not have interpreted the contracts' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S. at 567, 568. *This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act.*

"Our holding here is not inconsistent with our holding in *Moore* v. *Illinois Cent. R. Co.*, 312 U. S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board.

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. The holding of the *Moore* case does not conflict with this decision, and no contrary inference should be drawn from any language in the *Moore* opinion. It was error for the New York courts to uphold a declaratory judgment interpreting these collective-bargaining agreements." (339 U. S. 242-245; Emphasis added.)

In *Order of Ry. Conductors* v. *Southern Ry. Co.*, 339 U. S. 255, decided the same day as *Slocum*, the Court held that a South Carolina state court was without power to interpret the terms of a collective bargaining agreement because the Railway Labor Act conferred exclusive primary jurisdiction on the National Railroad Adjustment Board.

Petitioners cite several Kentucky cases in support of their argument that the Jefferson Circuit Court has jurisdiction to interpret the collective bargaining agreements: *Gregg* v. *Starks*, 188 Ky. 834, 224 S. W. 459 (1920); *Piercy* v. *Louisville & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923); *McGregor* v. *Louisville & N. R. Co.*, 244 Ky. 696, 51 S. W. 2d 953 (1932); and *Louisville and N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. 2d 749 (1936). We point out that the first three of the above cases relied upon by petitioners were decided prior to the enactment by Congress of the 1934 Amendments to the Railway Labor Act and all of them were decided prior to this Court's decision in the *Slocum* case, *supra*.

Numerous state and federal courts have had occasion to apply the principle of the exclusive jurisdiction of the Adjustment Board announced by this Court in the *Slocum* case.[1]

In the recent case of *Pennsylvania R. Co.* v. *Day*, 360 U. S. 548 (Decided June 29, 1959), this Court emphasized the principle established in the *Slocum* case. In holding that the Adjustment Board had exclusive primary jurisdiction of the claim of a retired railroad employee, the Court said:

> ". . . we have held that the National Railroad Adjustment Board had exclusive primary jurisdiction over disputes between unions and carriers based on the provisions of a collective bargaining agreement. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239." (360 U. S. 550)
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> "The National Railroad Adjustment Board was established as a tribunal to settle disputes arising out of the relationship between carrier and employee. All the considerations which led Congress to entrust an expert administrative board with the interpretation of collective bargaining agreements are equally applicable when, as here,

[1] A few of these subsequent cases are: *Emmons* v. *Grand International Brotherhood, Etc.*, 340 Mich. 368, 65 N. W. 2d 736; *Brennon* v. *Delaware, L. & W. Railroad*, 303 N. Y. 411, 103 N. E. 2d 532, cert. den. 343 U. S. 977; *Isgett* v. *Atlantic Coast Line R. Co.*, 223 S. C. 56, 74 S. E. 2d 220; *Gainey* v. *Bro. Ry. Clerks*, 177 F. Supp. 421 (E. D. Pa.), affirmed 275 F. 2d 342 (C.A. 3), cert. den. 363 U. S. 811; *Spires* v. *Southern Ry. Co.*, 204 F. 2d 453 (C.A. 4); *Fingar* v. *Seaboard Air Line*, 277 F. 2d 698 (C.A. 5); *Broady* v. *Illinois Central R. Co.*, 191 F. 2d 73 (C.A. 7), cert. den. 342 U. S. 897; *Rose* v. *Great Northern Ry.*, 268 F. 2d 674 (C.A. 8); *Colbert* v. *Brotherhood of R. Trainmen*, 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924.

the employee has retired from service after initiating a claim for compensation for work performed while on active duty. . . . ." (360 U. S. 551)

* * * * * * *

". . . Thus it is plain both from a reading of the Act in light of its purpose and the needs of its administration and from the settled administrative interpretation that the Board has jurisdiction over respondent's claim for compensation.

"Since the Board has jurisdiction, it must have exclusive primary jurisdiction. All the considerations of legislative meaning and policy which have compelled the conclusion that an active employee must submit his claims to the Board, and may not resort to the courts in the first instance, are the same when the employee has retired and seeks compensation for work performed while he remained on active service. . . . ." (360 U. S. 552)

* * * * * * *

"Our decision in *Moore* v. *Illinois Cent. R. Co.*, 312 U. S. 630, does not stand in the way of this. The decision in that case has been given its proper, limited scope in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 . . ." (360 U. S. 553)

* * * * * * *

"Our consistent regard for the importance of having disputes between railroad employees and carriers settled by the administrative Board which Congress established for that purpose requires respondent to resort to the NRAB for adjudication of his claim." (360 U. S. 554)

We respectfully submit that it has been clearly established by this Court that the function of resolving disputes concerning the interpretation and application of collective bargaining agreements in the railroad industry has been given by Congress to the National Railroad Adjustment Board. The petitioners' claims fall within no recognized exception to this rule. Petitioners were represented by able counsel before the Adjustment Board, and they properly pursued the exclusive remedy available to them. *Slocum* v. *Delaware, L. & W. R. Co., supra; Pennsylvania R. Co.* v. *Day, supra.*

Award No. 2899 Is a Final and Binding Award and Precludes the Present Suit.

Petitioners contend that their submission of the dispute to the National Railroad Adjustment Board and the findings of that Board have no effect upon their right now to seek a judicial interpretation of the agreements in the Jefferson Circuit Court. We submit that their position is untenable.

Section 3 First (m) of the Act (45 U.S.C. § 153 First (m)) provides, in pertinent part, as follows:

> "The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, *and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.*" (Emphasis added.)

The question concerning the legal effect of an award of the Adjustment Board was before this Court in *Union P. R. Co.* v. *Price*, 360 U. S. 601, decided June 29, 1959. In that case a railroad employee who had been discharged submitted the grievance to the Adjustment Board, which found that his dismissal did not violate the collective bargaining agreement. After receiving this adverse award of the Board, the employee filed a diversity common-law action in a United States District Court to recover damages from the railroad for allegedly wrongfully discharging him in violation of the collective bargaining agreement. In holding that the adverse determination of the Adjustment Board precluded the employee from maintaining a suit, the Court stated:

> "Congress has said in § 3 First (m) of the Railway Labor Act that the Adjustment Board's 'awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' Respondent does not argue that a 'money award' is anything other than an award directing the payment of money. Indeed, it would distort the English language to interpret that term as including a refusal to award a money payment. Thus, the plain language of § 3 First (m), on its face, imports that Congress intended that the Board's disposition of a grievance should preclude a subsequent court action by the losing party. Furthermore, we have said of the Railway Labor Act that 'the specification of one remedy normally excludes another.' *Switchmen's Union of N. A.* v. *National Mediation Board*, 320 U. S. 297, 301. Thus, our duty to give effect

to the congressional purpose compels us to hold that the instant common-law action is precluded unless the over-all scheme established by the Railroad Labor Act and the legislative history clearly indicate a congressional intention contrary to that which the plain meaning of the words imports. Our understanding of the statutory scheme and the legislative history, however, reinforces what the statutory language already makes clear, namely, that Congress barred the employee's subsequent resort to the common-law remedy after an adverse determination of his grievance by the Adjustment Board." (360 U. S. 608-609)

* * * * * * *

"Plainly the statutory scheme as revised by the 1934 amendments was designed for effective and final decision of grievances which arise daily, principally as matters of the administration and application of the provisions of collective bargaining agreements. This grist of labor relations is such that the statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board, past the action under § 3 First (p) authorized against the noncomplying carrier, see *Washington Terminal Co.* v. *Boswell*, 75 U. S. App. D. C. 1, 124 F. 2d 235, aff'd. by an equally divided Court, 319 U. S. 732, or the review sought of an award claimed to result from a denial of due process of law, see *Ellerd* v. *Southern Pacific R. Co.*, 241 F. 2d 541; *Barnett* v. *Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579, 582. So far as appears, all of the Courts of Appeals and District

> Courts which have dealth with this problem have reached the conclusion we reach here. . . ." (360 U. S. 616-617)

We submit that this Court has clearly held that such an award of the Adjustment Board as is involved in the present suit, that is, a non-money award, is final and binding and precludes litigation of the dispute in the courts with the exception of two types of cases. We propose now to examine the two exceptions and to show that the present litigation is clearly not embraced within either of the exceptions.

The first exception is an action expressly provided for by Section 3 First (p) of the Railway Labor Act (45 U.S.C. § 153 First (p)). That section authorizes a suit in a United States District Court to enforce an award against a non-complying carrier. Clearly, the present proceeding is not an enforcement suit.

The second exception involves judicial review of an Adjustment Board award where it is claimed that the proceedings before the Board amounted to a denial of due process of law. Please see *Ellerd* v. *Southern Pacific R. Co.*, 241 F. 2d 541 (C.A. 7), cited with approval by this Court in the *Price* case. In the *Ellerd* case, the Court made it clear that in such a suit, the Adjustment Board is an indispensable party. In other words, the second exception involves a *direct* attack upon the award with the Adjustment Board being an indispensable party to the suit. Unlike the *Ellerd* case, petitioners' suit is nothing but a *collateral* attack upon the Board's award. The petitioners here are in the

same position as those in *Fidler* v. *Pennsylvania R. Co.*, 288 F. 2d 826 (C.A. 3), where the Court said:

> "The appellants' wage claims were denied by the National Railroad Adjustment Board. By their complaint they seek a trial *de novo* in the court below on the ground that the Board has not afforded them procedural due process. . . ."
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> * * * * * *
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> ". . . Even if it be assumed, however, that the appellants' position in this respect is correct, binding relief could not be granted in a case such as that at bar unless the Board be made a party to the action. See *Stranford* v. *Pennsylvania R. Co.*, D.C.D.N.J. 1957, 155 F. Supp. 680, 690, citing *Blackmar* v. *Guerre*, 1952, 342 U. S. 512, 72 S. Ct. 410, 96 L. Ed. 534. Since the Board is not a party to this action the court below was correct in dismissing the amended complaint."

In *Morrissette* v. *Chicago, B. & Q. R. Co.*, 299 F. 2d 502 (C.A. 7, 1961), cert. den. 369 U. S. 874 (May 14, 1962), several employees submitted a minor dispute to the Adjustment Board and their claims were denied. Thereafter, they filed a common-law action for damages based upon an alleged breach of the collective bargaining agreement. Their complaint was dismissed by the District Court, which held that the suit was precluded by *Union Pacific R. Co.* v. *Price*, 360 U. S. 601. The dismissal of the suit was affirmed by the Court of Appeals and this Court denied certiorari. The Court of Appeals stated:

> "The District Judge accordingly presumed the awards to have been validly determined. In any

event, as the District Court opinion notes, it would have been improper to pass on the validity of the Board's award when the Board was not a party to this suit. *Ellerd* v. *Southern Pacific R. Co.*, 7 Cir., 1957, 241 F. 2d 541." (p. 503)

Petitioners also apparently seek to secure a judicial review of the adverse award of the Adjustment Board and evade this Court's ruling in the *Price* case by their references to the cases of *Edwards* v. *Capital Air Lines, et al.*, 176 F. 2d 755, and *Rychlick* v. *Pennsylvania Railroad Co.*, 229 F. 2d 171 (C.A. 2). (Pet. 40). Neither of those cases support such a conclusion.

In the *Edwards* case, the Court very carefully stated (176 F. 2d 762):

"We mean to make this decision no broader than the case. We are fully conscious that implications of more general doctrines seem to appear. But other holdings can await other cases. To emphasize the narrow limits of our present ruling, we point out that we are not dealing with a case where there was merely a dispute between a company and its employees, in which the union represented the employees; or with one in which the union assumed a bona fide neutral position in a dispute between employees. This case, we repeat for emphasis, concerns the rights of a few non-members of the union in a proceeding in which the union aggressively presented and pressed the claims of its members adverse to the claims of these appellant non-members, under a contract negotiated by the union, and before a board upon which two of the four members were union representatives. [A System Board of Adjustment cre-

> gated by an agreement between the carrier and the union]. The nub of the question is whether such a contract can make the award of such a board in such a proceeding immune from judicial examination. We hold that it cannot."

The case at bar is clearly distinguishable from the *Edwards* case, for in the present case the unions did not appear in the proceedings before the Adjustment Board—much less oppose these petitioners—but petitioners submitted their claims to that body of their own free will, represented by competent counsel, and without any hindrance or opposition by the unions.

In the *Ryehlick* case the Court rested its decision upon one single precedent or authority and stated (229 F. 2d 171):

> ". . . Although it is true that Edwards v. Capital Air Lines, 84 U. S. App. D. C. 346, 176 F. 2d 755, arose under other sections of the Act, its *ratio decidendi* applies so exactly to the case at bar that we adopt it as a precedent."

It must also be remembered that the *Ryehlick* case was reversed by this Court, 352 U. S. 480.

Clearly the present suit does not fall within either of the two exceptions set forth by this Court in the *Price* case. We respectfully submit that the present suit is precluded by this Court's interpretation of the Railway Labor Act. *Union Pacific R. Co. v. Price, supra.*

Petitioners' Suit is not Actionable as one Based Upon Discrimination Where, as Here, the Discrimination Asserted Against The Louisville and Nashville Railroad Company is Based Solely Upon Its Alleged Misinterpretation of Collective Bargaining Agreements, the Precise Issue Decided Adversely to Petitioners by the National Railroad Adjustment Board.

Petitioners seek to evade the principles announced by the Court in *Slocum v. Delaware, L. & W. R. Co.*, *Pennsylvania R. Co. v. Day*, *Union Pacific R. Co. v. Price*, and the other decisions we have cited in this brief by the argument that the petitioners are victims of unlawful discrimination. We vigorously disagree with petitioners' argument and earnestly insist that the complaint and amended complaint fail to state a cause of action against the L&N based upon discrimination, much less the *hostile* and *invidious* discrimination required for a cause of action by the cases relied upon by petitioners.

The specific relief sought by petitioners involves the *interpretation of existing collective bargaining agreements* (5b-6b). Insofar as discrimination is concerned, the pleadings allege a mere conclusion of law and do not set forth any facts upon which petitioners could base any charge of discrimination. Not only is there a complete lack of allegations of facts showing arbitrary and discriminatory conduct on the part of respondents, but petitioners conceded in their original brief filed in the Court of Appeals of Kentucky that they were without knowledge of any basis for their conclusion. Indeed, in their complaint (1b), petitioners affirmatively allege that rules differ with the L&N

"only as to the interpretation of contracts as will hereinafter appear." The charge of discrimination, unsupported as it is by any *facts* even tending to show arbitrary, capricious or discriminatory conduct, is a mere conclusion of law and fails to state a claim of hostile discrimination. *Pellicer v. Brotherhood of Ry. & S.S. Clerks*, 118 F. Supp. 254 (S.D. Fla.), aff'd. 217 F. 2d 205 (C.A. 5); *Fagan v. Pennsylvania R. Co.*, 173 F. Supp. 465 (M.D. Pa.); *Gainey v. Brotherhood of Ry. Clerks*, 177 F. Supp. 421 (E.D. Pa.), aff'd. 275 F. 2d 342 (C.A. 3); cert. den. 363 U. S. 811.

Petitioners cite several cases which they argue support their position regarding discrimination: *Steele v. L&N R.R. Co.*, 323 U. S. 192; *Tunstall v. Brotherhood*, 323 U. S. 214; *Brotherhood of L.F.& E. v. Tunstall*, 163 F. 2d 289 (C.A. 4), cert. den. 332 U. S. 841; *Rolax v. Atlantic Coast Line R. Co.*, 186 F. 2d 473 (C.A. 4); *Graham v. Brotherhood of Firemen*, 338 U. S. 232; *Brotherhood of R. Trainmen v. Howard*, 343 U. S. 768; *Conley v. Gibson*, 355 U. S. 41. All of these cases are strikingly similar and none of them is even remotely apposite to the present case. Those cases clearly involved hostile and invidious discrimination—a discrimination based purely upon racial distinction. There is not even a suggestion that racial discrimination is involved in the present case. While we do not argue that hostile discrimination is limited solely to racial distinctions, we do insist that petitioners cannot avoid the principles clearly enunciated in the *Slocum* and *Price* cases and obtain another interpre-

tation of an existing collective bargaining agreement by the simple expedient of placing somewhere in the complaint a *naked* conclusion of "discrimination."

Not only are the pleadings completely lacking in any allegation of facts even tending to show that employees similarly situated were accorded unequal rights, but, in the Court of Appeals, we challenged petitioners to supply, even by brief, some ground forming a basis for discrimination. In a supplemental brief filed in the Court of Appeals, petitioners sought to supply the basis for discrimination which, in our opinion, only served to epitomize the complete lack of any proper basis for any charge of discrimination. In setting forth a formal statement of an issue of law in their supplemental brief, the petitioners stated:

> "The Railroad Company has violated the existing collective bargaining agreement—resulting in discrimination against Appellants. The Unions assented to this discrimination."

It is anomalous that the petitioners have asserted that the claimed discrimination is based upon L&N's alleged misinterpretation of an existing collective bargaining agreement, the precise issue decided adversely to petitioners by the National Railroad Adjustment Board, which Board, the Court has held has exclusive jurisdiction to interpret the agreement. *Slocum v. Delaware, L. & W. R. Co., supra*, and whose decisions involving such an award as this are final and binding. *Union Pacific R. Co. v. Price, supra.* To adopt peti-

tioners' notion or theory of discrimination would be to destroy the principles of *Slocum* and *Price*.

Petitioners also rely upon *Teague* v. *Brotherhood of Locomotive Firemen and Enginemen*, 127 F. 2d 53 (C.A. 6). The *Teague* case was an early racial-discrimination case decided April 9, 1942, and was decided prior to the decision of this Court in *Steele* v. *L. & N. R. R. Co.*, *supra* (December 18, 1944). The holding of the *Teague* case has been vitiated by the later decisions of this Court in the *Steele*, *Tunstall*, *Graham* and *Howard* cases, *supra*, wherein the Court has held that such racial discrimination is hostile and invidious, is proscribed by the Railway Labor Act, and that an action to set aside such an agreement is within the jurisdiction of the federal courts. We submit that the *Teague* case no longer represents a sound expression of the law and it should afford no support for petitioners' arguments in the present case.

We do not dispute that the *Steele* and subsequent discrimination cases cited by petitioners hold that hostile and invidious discrimination of employees is proscribed by the Railway Labor Act, but those cases involved instances where the employee or employees were seeking to have a collective bargaining agreement declared *invalid*. The Adjustment Board has no jurisdiction to determine the *validity* of a collective bargaining agreement—its statutory function is that of *interpreting* such agreements, and this Court specifically stated in the *Steele* case that there were no issues "as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad

Adjustment Board" (323 U. S. 205). The clear distinction between an issue involving the validity of an existing agreement in the discrimination cases cited by petitioners and an issue involving an interpretation of an existing agreement was made equally explicit in *Brotherhood of R. Trainmen* v. *Howard*, 343 U. S. 768, where the Court stated (p. 774):

> "Here, as in the *Steele* case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no adequate administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239. *This dispute involves the validity of the contract, not its meaning.*" (Emphasis added).

Petitioners do not seek to have any collective bargaining agreement declared invalid. To the contrary, petitioners rely, as they must, upon an existing collective bargaining agreement and seek only relief involving an interpretation of such an agreement. Remove from the petitioners' prayers the demand for the judicial interpretation of the agreement and no relief remains that could be granted against the L&N.

It is well established that seniority arises *only* out of, and has its scope determined by, the collective bargaining agreement—seniority rights are not inherent nor do they arise from mere employment alone without reference to the terms of an applicable collective

bargaining agreement. *McMullans v. Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50 (C.A. 10), cert. den. 351 U. S. 918; *Elder v. New York Cent. R. Co.*, 152 F. 2d 361 (C.A. 6); *Napier v. System Federation No. 91*, 127 F. Supp. 874 (W.D., Ky.); *Ford Motor Co. v. Huffman*, 345 U. S. 330. It necessarily follows that the alleged violation of the seniority rights of petitioners must be determined by the interpretation of the collective bargaining agreement.

We have shown earlier in this brief (p. 5) that under the applicable collective bargaining agreements there has existed for many years separate and distinct seniority districts for employees working in the South Louisville Roundhouse and for employees working in the South Louisville Shops (3b, 8b). Separate seniority rosters were required to be maintained, and were maintained, by the L&N for employees who worked at these two separate locations (3b-4b, 8b). The Roundhouse district employees had no seniority right or right to work in the South Louisville Shops district and the employees of the South Louisville Shops district had no seniority right or right to work in the Roundhouse district (8b). Petitioners admit (Pet. 4, 13) that the agreements provided for such a point seniority system.

There is nothing unlawful about a collective bargaining agreement which provides for such a point seniority system. In *Ford Motor Co. v. Huffman*, *supra*, this Court stated:

> ". . . Inevitably differences arise in the manner and degree to which the terms of any nego-

tiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion ".

* * * * * * *

". . . Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, *may well include differences based upon such matters as the unit within which seniority is to be computed*, . . ." (345 U. S. 338-339; Emphasis added).

The point seniority system limits the accumulation of seniority to some specific place of employment and this may be as limited as being confined to a particular part of a shop or plant. This seniority system is distinguishable from a company-wide seniority system or what is commonly referred to as "system-wide" seniority. Each of these seniority systems has its advantages and its disadvantages to employees. Many employees prefer the point seniority system because they feel more secure in knowing that, under this seniority system, they cannot be displaced by other employees merely because the latter employees have been with the company much longer although at other points. Other employees, particularly those with many

years of service to a company, no doubt prefer system-wide seniority because they believe it inherently unfair not to be allowed to displace other employees, at different points, whose length of service to the company is less than their own.

However, irrespective of the relative advantages and disadvantages of the different systems of accumulating seniority, seniority is strictly a matter of agreement, and the particular collective bargaining agreements involved here provided for the point seniority system. The case now before the court itself reveals some of the advantages and disadvantages to employees of the point seniority system. In this particular instance, it was advantageous to the employees of the South Louisville Shops to have in effect under existing collective bargaining agreements a seniority system that protected their seniority standing within the South Louisville Shops. In this particular instance, the point seniority system operated to the disadvantage of some of the petitioners because, due to the very nature of this system of seniority which was provided for by the agreements, they could not lawfully displace any of the employees in the South Louisville Shops merely because some of the petitioners may have been in the service of the railroad for a longer period of time.

In *Steele* v. *Louisville and N. R. Co.*, *supra*, while the Court held that hostile and invidious discrimination among employees is impliedly prohibited by the Railway Labor Act, the Court was also careful to state:

> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, . . . are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit." (323 U. S. 203)

The complaint and amended complaint herein fail to allege any facts tending to show that employees *similarly situated* were accorded unequal rights. These pleadings affirmatively reveal that under the applicable collective bargaining agreements *separate* seniority rosters were required to be maintained, and were maintained, for Roundhouse employees and the employees of the South Louisville Shops, *a relevant distinction based upon the place of work*, a common situation in the collective bargaining agreements in the railroad industry. Thus, it is conceded by the petitioners (Pet. 4, 13) that the seniority rights of the Roundhouse employees were not the same as the seniority rights of the employees of the South Louisville Shops. *Therein lies the relevant distinction between these two groups of employees.* There is nothing unlawful about the agreements which create the joint seniority system and make the distinction between the seniority rights of the Roundhouse employees and the employees of the South Louisville Shops. *Ford Motor*

Co. v. *Huffman*, *supra*. Furthermore, petitioners do not argue that the collective bargaining agreements are invalid. Instead, they rely upon the agreements and seek only their interpretation.

The record in the present case shows *only* that petitioners were adversely affected by the changes in the mechanical operations made on February 18, 1957—changes which, after the complete dieselization of the railroad, L&N could perform more economically and efficiently in its facilities at the South Louisville Shops. The mere fact that petitioners were adversely affected by the discontinuance of the facilities at the South Louisville Roundhouse is totally insufficient to support a conclusion of discrimination. This should be particularly true in such a case as this where, on their faces, the complaint and amended complaint *affirmatively* show the real and very relevant basis for distinguishing between the seniority rights of the two different groups of employees, that is, the point seniority system provided for by the existing and applicable collective bargaining agreements.

The law is well established, from decisions of both state and federal courts, that merely by naming a labor union as a defendant and by adding *naked* charges of discrimination, fraud or collusion, an employee does not vest jurisdiction in the courts to determine a controversy which depends upon the interpretation of a collective bargaining agreement between a railroad and a labor union. *Hippensteel* v. *System Federation No. 9*, 337 Mich. 251, 59 N. W. 2d 278; *Emmons* v. *Grand International Brotherhood, Etc.*, 340 Mich. 368, 65

N. W. 2d 736; *Bennett* v. *Progress Lodge 992, Etc.*, 159 F. Supp. 93 (D.C. Mass., 1958); *Rose* v. *Great Northern Railway Company*, 268 F. 2d 674 (C.A. 8) and *Colbert* v. *Brotherhood of R. Trainmen*; 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924.

Other Arguments Advanced by Petitioners in Their Effort to Evade the Adverse Award of the National Railroad Adjustment Board are Completely Lacking in Merit.

While the basic argument advanced by petitioners in their effort to escape the impact of the Board's exclusive jurisdiction and its adverse award involves their unfounded reliance upon the discrimination cases discussed in the preceding part of this brief, several other contentions are intermingled throughout their petition without any separate designation of them having been made by petitioners.

A. The Dispute Over the Interpretation of the Collective Bargaining Agreements Was a Minor Dispute and Was Properly Referred to the National Railroad Adjustment Board.

Petitioners refer to the dispute as a "major" dispute (Pet. 26) and cite *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, and *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U. S. 284. Petitioners' reasoning appears to be that, under the existing collective bargaining agreements, the L&N is required to maintain the South Louisville Roundhouse and that it could do nothing to change the performance of mechanical operations at the South Louisville

Roundhouse without negotiating a change in the existing agreements. (Pet. 4, 19, 23, 24). Petitioners thus conclude (Pet. 26) that such negotiations for contract changes would have presented a major dispute. Petitioners state (Pet. 8) that they should have filed this suit promptly in 1957, and that there was no necessity of submitting such a dispute to the Adjustment Board. Indeed, petitioners' present counsel contend (Pet. 37-38) that the Adjustment Board had no jurisdiction to decide the dispute. We submit that such arguments are untenable.

This Court has held that two different types of disputes are embraced by the Railway Labor Act—major disputes and minor disputes. Major disputes are those arising from efforts to obtain an agreement and they involve the acquisition of new rights for the future, not the assertion of rights claimed to have vested in the past. Minor disputes, on the other hand, contemplate the existence of a collective bargaining agreement, and such disputes involve the meaning or proper application of a particular provision of the agreement to a specific situation. *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711; *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30.

The dispute between the petitioners and the L&N involves nothing more than an interpretation of existing collective bargaining agreements. The specific relief sought by petitioners is a declaration of rights as against the L&N *under the contracts between the L&N and the unions*, a declaration of rights as between petitioners and the unions *as to the interpreta-*

tion of said contracts, an accounting for wages allegedly lost *due to L&N's allegedly erroneous interpretation of the agreements*, and the recovery of costs, expenses and counsel's fee. Indeed, in their complaint (1b) petitioners dispel all doubt concerning the real basis of this suit by affirmatively alleging that they differ with the L&N "only as to their interpretation of contracts as will hereinafter appear." The affidavits of record (39b-41b) filed by petitioners reveal most clearly that "the action is one for a declaration of rights against defendant railroad and unions *as to the interpretation of a contract* as to plaintiff's and other's seniority rights and for an accounting for wages lost because of wrongful loss of seniority." (Emphasis added).

Even assuming, *arguendo*, that a major dispute is involved, as the petitioners contend, it avails petitioners precisely nothing because *it is well established that no court has jurisdiction to decide a major dispute, no power existing in any court to make an agreement for the parties.* Please see *Elgin, J. & E. Ry. Co. v. Burley, supra*, page 275, where, speaking of a major dispute, this Court stated:

> ". . . No authority is empowered to decide the dispute and no such power is intended unless the parties themselves agree to arbitration."

There can be no doubt whatsoever that the present dispute is one that has been classified as a "minor" dispute by this Court, since it involves a dispute over the proper interpretation of an existing collective bar-

gaining agreement, and the dispute was properly one within the exclusive jurisdiction of the National Railroad Adjustment Board.

B. Inherent in the Award of the Adjustment Board Is a Finding That the Existing Agreements Did Not Preclude the L&N From Discontinuing Mechanical Operations at the South Louisville Roundhouse.

Petitioners contend (Pet. 19, 23-24) that, since the collective bargaining agreements provided for the South Louisville Roundhouse as a separate seniority point, the L&N was required by the agreements to continue its mechanical operations at that seniority point. We disagree with such a contention.

First, we point out that, in their submission to the Adjustment Board (26b), petitioners properly conceded the right of the L&N to abolish the Roundhouse and stated:

> "3. Petitioners do not claim or contend that the carrier had no right to abolish the roundhouse and to consolidate the work theretofore done by roundhouse forces with the work theretofore performed by the South Louisville Shops forces. . . ."

It is apparent from its findings (36b-37b) that the Adjustment Board was aware that the L&N had discontinued its mechanical operations at the South Louisville Roundhouse and the Board held that the existing agreements had not been violated (37b).

Moreover, it is a patently erroneous interpretation of the collective bargaining agreements to assume that

the L&N could not discontinue its mechanical operations at a particular seniority point. To assume that the L&N could not discontinue a part of its mechanical operations because the agreements contained no express provision giving it that right is a manifest *non sequitur*. *Cf. Street, Electric Ry. & Motor Coach Employees* v. *Greyhound Corp.*, 231 F. 2d 585 (C.A. 5), where it is stated:

> "The agreement is silent on the precise question in issue. It provides for the exercise of seniority rights in case of 'reduction in forces', but nowhere defines this term or declares when such reductions are justified. On the other hand, there is no provision in the contract which may be construed as an explicit authorization for this action on the part of the employer.
>
> * * * * * * * * *
>
> "The union argues that the recognition in the contract that there will be reductions in forces means only reductions to a point less than completely eliminating all the jobs in a classification, since to rule otherwise would allow the destruction of part of the very subject matter of the agreement. . . .
>
> "In prior ruling on the question, the cases are heavily on management's side. It is settled Florida law that if an employer discontinues a part of his business he is under no duty to pay wages to those workers left jobless by the change. *Amalgamated Ass'n. of Street, Electric Railway & Motor Coach Employees* v. *Tampa Electric Co.*, 47 So. 2d 13. The union argues that this situation is distinguishable from the case at bar, where

the operation was not suspended but was merely transferred to a third party. However, other cases more directly in point with the instant situation hold that the type of limitation on management's freedom of operation urged here will not be implied merely from the fact that the parties agreed on terms and conditions covering the jobs in question. . . ."

In *United States Steel Corp.* v. *Nichols*, 229 F. 2d 396 (C.A. 6), cert. den. 351 U. S. 950, the Court stated:

> "The relationship of master and servant or employer and employee is not dependent upon a collective bargaining contract. It has existed for innumerable years, long before the origin of the modern-day collective bargaining agreements. . . . The common law rights inherent in such relationship still exist except to the extent that they may be modified by legislation or by the specific contract between the employer and the employee. One of such common law rights is the right of the employer to select and hire his employees and to terminate the employment at will."

After pointing out that such a common law right is not abridged by legislation, the Court then looked to the collective bargaining agreement and stated:

> "Accordingly, instead of searching for a provision in the contract *authorizing* termination of employment by reason of age, we think it is necessary to determine from a consideration of the terms of the contract whether termination of employment by reason of age was *prohibited* by the contract. . . ." (Emphasis added).

In *New York Central R. Co.* v. *Brotherhood of R. Trainmen*, 140 F. Supp. 273 (N.D., Ohio), aff'd. 246 F. 2d 114 (C.A. 6), cert. den. 355 U. S. 877, the District Court stated:

> "We are of the opinion that the proposed closing of the Yard is a decision for management alone to make if, in the interest of efficiency of operation, service to the public or meeting competition, management should deem such a step advisable. We can envision any number of situations wherein management would decree a physical change in its method of operations either in its offices, its terminals, on its roadbeds, in its roundhouses, or in the operation of its trains, wherein the work of certain of its employees would be affected, and see no reason why management should be precluded from making these decisions in the interest of their company as well as of the public. Such decisions have been and are being made by public carriers as a matter of right and without consultation with their employees. To decree otherwise would bring about a violent disruption to our free enterprise system."

There was nothing at all in the collective bargaining agreements that prevented the L&N from discontinuing its mechanical operations at the South Louisville Roundhouse and, thereafter, having its mechanical operations performed at the South Louisville Shops.

C. The Interstate Commerce Act Did Not Preclude the L&N From Discontinuing Mechanical Operations at the South Louisville Roundhouse Without the Approval of the Interstate Commerce Commission.

Petitioners appear to have erroneously assumed (Pet. 21-22) that the L&N could not lawfully discontinue its mechanical operations at the South Louisville Roundhouse without the approval of the Interstate Commerce Commission, for they cite and rely upon the Interstate Commerce Act (49 U.S.C. § 5(2)(c)) and the following cases: *United States* v. *Lowden*, 308 U. S. 225; *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, and *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U. S. 169. Petitioners' reliance upon such authority is misplaced. 49 U.S.C. § 5(2)(c) applies only to mergers, consolidations and acquisitions of control *involving two or more carriers*. It is inapplicable to instances, such as the one involved here, where the changes in mechanical operations involved no other carrier except the L&N.

Neither does *Interstate Commerce Commission* v. *Railway Labor Executives' Association, supra*, support petitioners. That case involved a proceeding before the Interstate Commerce Commission for authority, under Section 1(18) of the Interstate Commerce Act (49 U.S.C. § 1(18)), to abandon a line of railroad. It has no application to the type of tracks removed from the South Louisville Roundhouse area by the L&N.

The L&N was not prohibited by any law, state or federal, from discontinuing its mechanical operations at the South Louisville Roundhouse and, thereafter, having its mechanical operations performed at the South Louisville Shops. It was strictly an internal change in L&N's mechanical operations and was a mat-

ter for the exercise of managerial prerogative and discretion.

D. The Adjustment Board Had Jurisdiction to Decide the Dispute Involving the Seniority Rights of Petitioners and the Board's Award Did Not Purport to Decide Any Constitutional Question, Nor Is Any Constitutional Question Involved.

Petitioners argue that the L&N violated the collective bargaining agreements, thereby wrongfully destroying their seniority rights at the Roundhouse and that such accrued seniority is a property right (Pet. 19, 23-24). They appear to contend (Pet. 18-21) that the failure of the L&N and the unions to respect their property rights, namely, their accrued seniority, is in violation of the Fourteenth Amendment to the Constitution of the United States. Petitioners cite *Hill* v. *United Public Workers of America*, 314 Ky. 791, 236 S. W. 2d 887. Petitioners' argument, as we understand it, is that such a constitutional question is one for determination by the Court, not by the Adjustment Board.

We submit that the petitioners misconceive the nature of their seniority rights. Seniority among employees is wholly contractual. There is no constitutional or statutory basis for their seniority rights. Nor do seniority rights arise from a mere employment alone without reference to the terms of an applicable collective bargaining agreement. *McMullans* v. *Kansas, Oklahoma & Gulf Rwy. Co.*, 229 F. 2d 50 (C.A. 10), cert. den. 351 U. S. 918; *Elder* v. *New York Cent. R. Co.*, 152 F. 2d 361 (C.A. 6); *Napier* v. *System Federa-*

tion No. 91, 127 F. Supp. 874 (W.D. Ky.); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Colbert* v. *Brotherhood of R. Trainmen*, 206 F. 2d 9 (C.A. 9), cert. den. 346 U. S. 931, reh. den. 347 U. S. 924. It necessarily follows that the alleged violation of petitioners' seniority rights must be determined by the interpretation of the collective bargaining agreements, and this Court has clearly held that the Adjustment Board has *exclusive* primary jurisdiction to interpret collective bargaining agreements between a railroad and its employees. *Slocum* v. *Delaware, L. & W. R. Co., supra; Pennsylvania R. Co.* v. *Day, supra*, and other similar cases earlier cited herein.

Hill v. *United Public Workers of America, supra*, lends no support to petitioners. The *Hill* case is distinguishable from the present case upon several grounds. First, the *Hill* case did not involve the Railway Labor Act but the National Labor Relations Act, and there is a vast distinction, in the procedures for the settlement of disputes, between the Railway Labor Act and the National Labor Relations Act. *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30, 31-32, note 2; *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 211, note 30.

Secondly, one of the primary questions involved in the *Hill* case was whether there was a collective bargaining agreement in effect. No question is presented in the present case concerning the existence of a valid collective bargaining agreement.

Lastly, interwoven with the question of the existence of a collective bargaining agreement in the *Hill*

case was the question of what union was the authorized representative of the employees. In the present case, the petitioners do not question that the respondent unions are the proper collective bargaining representatives for the making of collective bargaining agreements on behalf of the petitioners' crafts and classes of employees, and, if they had raised such a question, we point out that, under the Railway Labor Act, Congress has delegated to the National Mediation Board the exclusive jurisdiction for determining that question with no judicial review of its decision by the courts. *Switchmen's Union v. National Mediation Board,* 320 U. S. 297.

The speciousness of petitioners' claimed constitutional rights readily becomes apparent when it is realized that, carrying such a theory to its logical extreme, the Adjustment Board would never have jurisdiction to determine claims involving alleged contract violations—it could always be argued that accrued rights under existing agreements are vested property rights; that any interference with such property rights is in violation of the Constitution; and that the Board has no jurisdiction to decide such Constitutional questions.

E. All Disputes Involving Petitioners' Seniority Rights Under Existing Collective Bargaining Agreements Were Issues Within the Exclusive Jurisdiction of the Adjustment Board.

Petitioners contend (Pet. 37-39) that, assuming that the Adjustment Board had any jurisdiction at all con-

cerning their claims, the only decision or finding by the Board that could be final and binding is the finding that the collective bargaining agreements provided only for standard point seniority." The implication from petitioners' contention is that, since the Board decided only one issue involving their seniority rights under the agreements, the Jefferson Circuit Court has jurisdiction to decide all other issues involving the interpretation of the agreements.

We do not agree that the findings of the Adjustment Board are as limited as petitioners contend. However, we need not labor this point again here because, assuming, *arguendo*, that there are issues in the present case involving the interpretation of the agreements that were not submitted to or decided by the Board, petitioners cannot escape the principle that all such issues involving interpretation of the agreements, the sole source of their seniority rights, whether actually submitted to the Board or not, are nonetheless issues properly within the *exclusive* primary jurisdiction of the Board. Thus, if petitioners failed to submit any issues over the interpretation of the agreements to the Board, their failure to do so could not confer jurisdiction on the Jefferson Circuit Court to decide such issues.

On this theory, employees could skip completely the Board proceedings provided for and contend that, since the Board had not decided any of the issues involving the interpretation of an agreement, the Court has jurisdiction to decide them all.

F. Petitioners' Argument That Their Seniority Rights Follow the Transfer of Work to Another Existing Seniority Point and That the Court, Not the Adjustment Board, Must Determine Such an Issue, Is Without Merit.

Petitioners argue (Pet. 39-40) that courts have held that transfers of work carry with it the transfer of seniority rights of the employees. They rely upon *Metal Polishers, Etc., Union* v. *Viking Equipment Co.*, 278 F. 2d 142 (C.A. 3), and *Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (C.A. 2), cert. den. 368 U. S. 814. These cases do not support the petitioners, for several reasons.

First, both of the cases involve agreements negotiated under the National Labor Relations Act or the Labor Management Relations Act. In *Brotherhood of R. Trainmen* v. *Chicago River & I. R. Co.*, 353 U. S. 30, the Court stated (pp. 31-32, note 2):

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended 29 U.S.C. Sec. 151 et seq., 29 U.S.C.A. Sec. 151, et seq."

The Railway Labor Act created the Adjustment Board and gave it *exclusive* primary jurisdiction to interpret collective bargaining agreements between employers and employees covered by the Act. No similar board for this purpose was established or provided for in the National Labor Relations Act or the

Taft Hartley Act and, unless the employers and employees covered by the latter acts agree to arbitration, they may resort to the Courts for such interpretations.

Moreover, aside from this important *procedural* distinction, the two cases are distinguishable from the present case on the merits. The basic question involved in the *Zdanok* and *Metal Polishers* cases was whether the move of the entire company to a *new* plant rendered the *entire* collective bargaining agreement at the old plant inapplicable to the newly located plant in another city. The cases were decided upon the wording of the particular agreements there involved.

In *Oddie* v. *Ross Gear and Tool Co.*, 305 F. 2d 143 (C.A. 6), cert. den. 371 U. S. 941, the Court held that the collective bargaining agreement in effect at the old plant in Detroit did not extend the employees' seniority rights to corresponding jobs in the *new* Tennessee plant to which the employer moved the entire company. Judge Miller properly distinguished the *Zdanok* and *Metal Polishers* cases, as follows:

> ". . . in that case [*Zdanok* v. *Glidden Co., supra,*] . . . there was no specific geographical limitation such as is contained in the agreement in the present case. In that respect the agreement in the *Glidden Company* case is materially different from the agreement in the present case, and in our opinion is not applicable on this phase of the case. In *Metal Polishers, etc.* v. *Viking Equipment Co.*, 278 F. 2d 142, C.A. 3rd, also relied upon by the plaintiffs, it appears that the new location of the plant involved was still within the geographical limits referred to in the collective bar-

gaining agreement, which, of course, is vitally different from the situation which we are considering in the present case."

In the present case the applicable collective bargaining agreements provided for only standard point seniority and petitioners' seniority was acquired at and limited to the South Louisville Roundhouse. We submit that the Adjustment Board specifically found that petitioners did not have the right to transfer their seniority to the South Louisville Shops, another separate seniority point (36b-37b).

CONCLUSION.

The decision below is correct. No unsettled question of importance is actually presented, and there is no conflict of decisions. Accordingly, a writ of certiorari should not issue.

Respectfully submitted.

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CERTIFICATE OF SERVICE.

I, H. G. Breetz, one of the attorneys for respondent, Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of July, 1963, I served copies of the foregoing brief and following appendix on the several parties as follows:

1. On petitioners by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorneys of record, as follows:

Blakey Helm
606 Louisville Trust Building
Louisville 2, Kentucky

Joseph B. Helm
606 Louisville Trust Building
Louisville 2, Kentucky

2. On respondents, other than the Louisville and Nashville Railroad Company, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorneys of record, as follows:

Richard R. Lyman
741 National Bank Building
Toledo 4, Ohio

Robert E. Hogan
Kentucky Home Life Building
Louisville, Kentucky.

H. G. BREETZ

EXCERPTS FROM THE COMPLAINT.

* * * * * * *

3. Defendant, Louisville and Nashville Railroad Company, is a Kentucky corporation engaged in interstate transportation of freight and passengers with its chief office and place of business at Louisville, Kentucky, and is a carrier as defined by the Railway Labor Act, 1934. Plaintiffs and the others whom they represent are all long time employes of said defendant, Railroad Company, proud of their connection with said defendant and differing from said defendant only as to the interpretation of contracts as will hereinafter appear.

4. Defendant, System Federation No. 91, Railway Employes' Department, A.F.L.-C.I.O., is an unincorporated association, or labor union, all of whose members are employees of the Louisville and Nashville Railroad Company and are likewise members of one or the other of the following labor unions, each of which is an international unincorporated association whose members are employed by the Louisville and Nashville Railroad Company and other interstate railroads, each of which unincorporated association is a labor union, composed of various local lodges or unions located at various points upon the Louisville and Nashville Railroad Company and other interstate railroads, each of which lodges or local unions is an unincorporated association whose members are employees of the Louisville and Nashville Railroad Company or of the particular railroad upon which said local is located, said labor unions operating upon the Louisville and Nashville Railroad Company lines, through the System Federation, including the following unions: International Association of Machinists, Sheetmetal Workers International Association, International Brotherhood of Electrical Workers and the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

* * * * * * *

Excerpts From the Complaint

9. An Agreement made pursuant to said Railway Labor Act 1934, as amended, effective September 1, 1943 with revisions up to February 1, 1952 was in effect on and prior to February 18, 1957, between the defendant Railroad Company and the Machinists Union, the Sheetmetal Workers Union, and the Electricians Union, operating through said System Federation No. 91, covering rules and working conditions. A copy of said Agreement is filed herewith marked "Exhibit A."

10. An Agreement made pursuant to the Railway Labor Act 1934, as amended, effective June 1, 1942 with revisions up to November 1, 1946, was in effect on and prior to February 18, 1957 between the defendant Louisville and Nashville Railroad Company and International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, represented by System Federation No. 91, covering rules and working conditions. A copy of said Agreement is filed herewith marked "Exhibit B".

11. The following provisions of the skilled employes' agreement relating to seniority were in effect prior to and on February 18, 1957, and still are in effect:

> "29(a) Seniority of each employe covered by this agreement will begin from the date and time the employe starts to work.
>
> "29(b) Seniority of employes in each craft covered by this agreement shall be confined to the point employed for those who perform work as per special rules of each craft in the various departments of the railroad as follows:
>
> Machinists
> Boilermakers
> Sheet Metal Workers
> Moulders
> Electricians

Excerpts From the Complaint

"Four subdivisions of the Carmen as follows:

Patternmakers
Upholsterers
Painters
Other Carmen
Coach Cleaners

"At Louisville, Kentucky, seniority rosters for each craft will be maintained as follows:

Machinists
South Louisville Shops
South Louisville Roundhouse

Boilermakers
South Louisville Shops
South Louisville Roundhouse

Sheet Metal Workers
South Louisville Shops
South Louisville Roundhouse
Union Passenger Station

Electricians
South Louisville Shops
South Louisville Roundhouse
Union Passenger Station

Other Carmen

"At South Louisville Shops the Air Brake Room, Coach Carpenters, Painters, Tank Shop #12, Planing Mill, Cabinet Shop and Plating Shop; and Louisville Terminal Car Department, Roundhouse and Union Passenger Station seniority rosters will be maintained separately as heretofore.

* * * * * * * * *

20. Plaintiffs and the employes they represent had worked for many years at defendant Railroad Company's South Louisville Roundhouse. As provided in said agreements they were listed on the Rosters for the South Louis-

ville Roundhouse according to seniority from their last employment by defendant Railroad Company. • • •

21. On February 4, 1957 the Master Mechanic who had previously had supervision over the South Louisville Roundhouse and since July 1, 1956, of the South Louisville Shops also, issued bulletin No. 39 relating to South Louisville Roundhouse employes, which reads as follows:

"LOUISVILLE & NASHVILLE RAILROAD CO.
Office of the Master Mechanic
So. Louisville, Ky., February 4th, 1957

BULLETIN No. 39

TO ALL EMPLOYEES CONCERNED:

Effective at the close of work of the third shift, February 17, 1957, all Mechanical operations of the South Louisville Roundhouse will be discontinued.

All roundhouse forces will be laid off in keeping with Rule 26 of the skilled employes agreement, and Rule 13 of the unskilled employes agreement.

As a result of the foregoing, the following employes will be cut off in force reduction:

• • • • • •

27. The action of the defendant Railroad Company in laying off the plaintiffs and the other employes whom they represent was without any justification, arbitrary and in violation of the agreements between the various classes of employes affected and the defendant Railroad Company.

28. • • •

On January 28, 1957 representatives of the defendant Railroad Company held a conference with the Shop Craft Representatives comprising System Federation No. 91, A.F.L.-C.I.O. and representatives of each of the four unions involved in this action. At that conference these represent-

atives of the System Federation and of these unions were fully apprised as to the alleged details of force reduction. The representatives of System Federation No. 91 A.F.L. made no objection to the laying off of the plaintiffs and the employes whom they represent and acceded to the interpretation of the contracts in line with the proposed action of the defendant Railroad Company.

Plaintiffs and the other employes whom they represent all protested within ten days against their being laid off and being required to accept employment as of a new seniority date not earlier than February 18, 1957 but their protests were denied by the defendant Railroad Company.

29. Plaintiffs and the employes whom they represent then took an appeal to the National Railroad Adjustment Board, Second Division, and said appeal was heard by said Board but said Board on June 30, 1958 found that the grievance arose because of the closing of the South Louisville Roundhouse, a separate seniority point of the Carrier and that there was no provision in the contract requiring the dovetailing of seniority rights.

* * * * * * * *

32. By reason of said acts of said defendant Railroad Company in failing to recognize the seniority rights, and the rights to employment of plaintiffs and the other employes they represent, each of said employes has been damaged both in loss of job rights, loss of vacation rights and actual loss of time at work, which can be computed after a declaration of rights.

* * * * * * * *

WHEREFORE, plaintiffs pray and demand

1. A declaration of rights as against defendant Railroad Company for each of the plaintiffs and the other employes listed on the South Louisville Roundhouse Roster

on February 17, 1957, under the contracts between defendant Railroad Company and said Unions.

2. A declaration of rights as between System Federation No. 91 and defendant International Unions, as to the interpretation of said contracts.

3. An accounting by the defendant Railroad Company to each of said employes on the South Louisville Roundhouse Roster for the wages for time lost.

4. Recovery against the defendant System Federation and defendant Unions for plaintiffs' expenses herein, and recovery against all defendants of costs and an appropriate fee for plaintiff's counsel.

MOTION OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT.

* * * * * * *

Defendant, Louisville and Nashville Railroad Company, by counsel, moves the Court to dismiss this action, or, in the alternative, for a summary judgment on behalf of the defendant on the grounds that this Court does not have jurisdiction of the subject matter of the complaint, because (1) Under the Railway Labor Act, 45 U.S.C.A. 153, *exclusive* jurisdiction is vested in the National Railroad Adjustment Board in disputes involving the interpretation of collective bargaining agreements. The subject matter of the complaint is a dispute between employees and their employer involving the interpretation of collective bargaining agreements, and, therefore, this Court has no jurisdiction of the subject matter of the complaint. (2) The employee plaintiffs having already taken their case to the National Railroad Adjustment Board and said Board having already

decided the issue involved in said case adversely to the employee plaintiffs, they are bound by said Board's decision, and this Court would have no jurisdiction in the matter.

Defendant files herewith and makes part of this motion the affidavit of W. S. Scholl, Director of Personnel of the Louisville and Nashville Railroad Company.

AFFIDAVIT OF W. S. SCHOLL.

* * * * * * *

Affiant, W. S. Scholl, after first having been duly sworn, states that he is Director of Personnel of the Louisville and Nashville Railroad Company with headquarters at Louisville, Kentucky. As such Director of Personnel, it is his duty and responsibility to make collective bargaining agreements with the collective bargaining representatives of the various crafts or classes of employees represented by said collective bargaining representatives. It is his further duty and responsibility to handle disputes and grievances arising under said collective bargaining agreements and the interpretation thereof.

Affiant further states that at all times involved herein, e International Association of Machinists was and is now the collective bargaining representative of the craft or class known as machinists; that the Sheetmetal Workers International Association was and is now the collective bargaining representative of the craft or class known as pipefitters; that the International Brotherhood of Electrical Workers was and is now the collective bargaining representative of the craft or class known as electricians and International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers was and is now the collective bargaining representative of the craft or class known as

laborers; that all of said unions operate through System Federation No. 91 of the Railway Employes' Department, A.F.L.-C.I.O.

Affiant further states that the Louisville and Nashville Railroad Company has entered into collective bargaining agreements with said unions covering the crafts or classes of employees represented by them, in accordance with the provisions of the Railway Labor Act.

Affiant further states that in accordance with the collective bargaining agreements heretofore mentioned, separate and distinct seniority districts were established for employees working in the South Louisville Roundhouse and the South Louisville Shops. As a result of said separate and distinct seniority districts, the seniority of employees working at the South Louisville Roundhouse was confined to that point and they had no seniority right or right to work in the South Louisville Shops.

Affiant further states that on or about February 17, 1957, all mechanical operations previously performed at the South Louisville Roundhouse were discontinued and, as a result thereof, it was necessary to furlough all employees engaged in the operations of said South Louisville Roundhouse.

Affiant further states that although all mechanical operations formerly performed in the South Louisville Roundhouse have been discontinued, seniority rosters are now and will continue to be maintained covering all employees working at said point and in which each of them now and will continue to maintain their seniority standing established at the time of the discontinuance of said mechanical operations. In the event that mechanical operations should at some time in the future be re-established at the South Louisville Roundhouse, the said employees will be given priority to the work to be performed there

and with the seniority they had established before such operations were discontinued on or about February 17, 1957.

Affiant further states that upon being furloughed on or about February 17, 1957, as set out above, employees were given the opportunity to work in the South Louisville Shops, but it was necessary for them to begin their work there as new employees because the seniority they accumulated as employees of the South Louisville Roundhouse could not be transferred with them to the South Louisville Shops under the provisions of the applicable collective bargaining agreements.

Affiant further states that the said employees furloughed on or about February 17, 1957, were dissatisfied because the seniority accumulated by them in the South Louisville Roundhouse seniority district could not be carried over by them into the seniority district of the South Louisville Shops and dovetailed or interwoven with the seniority of the employees working and having seniority in the South Louisville Shops, according to seniority dates.

Affiant further states that said employees took their dispute to the National Railroad Adjustment Board pursuant to the provisions of the Railway Labor Act. A copy of their submission is attached hereto, and made part hereof, marked Exhibit "A".

Affiant further states that the Louisville and Nashville Railroad Company made its reply to said submission, a copy of which is attached hereto, and made part hereof, marked Exhibit "B".

The National Railroad Adjustment Board found that said employees had no right to have their seniority established in the South Louisville Roundhouse dovetailed or interwoven with the seniority established by employees working in the South Louisville Shops. Therefore, the National Railroad Adjustment Board found that the con-

trolling collective bargaining agreement had not been violated by the Louisville and Nashville Railroad Company and the claims of the employees were denied. A copy of said award is attached hereto, and made part hereof, marked Exhibit "C".

According to the provisions of the Railway Labor Act (45 U.S.C.A. Section 153 (m)), the award of the National Railroad Adjustment Board is final and binding upon the said employees and upon the Louisville and Nashville Railroad Company.

(s) W. S. Scholl.

Commonwealth of Kentucky:
County of Jefferson:

Subscribed and sworn to before me this 30th day of Mar., 1960.

My Commission expires February 19, 1963.

(s) A. M. Bradford,
Notary Public,
Jefferson County, Kentucky.

(Seal)

Adjustment Board Award No. 2899

Award No. 2899
Docket No. 2787-I
2-L&N-I-'58

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

PARTIES TO DISPUTE:

J. D. MASDEN, ET AL.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: (1) By Bulletin dated February 4, 1957, the Louisville and Nashville Railroad Co., (hereinafter referred to as the Carrier) announced the discontinuance of all mechanical operations of its South Louisville Roundhouse, effective at the close of the third shift, February 17, 1957. Petitioning employees (hereinafter called petitioners) who prior to that date had been making inspections and running repairs to and servicing diesel locomotives, at points which for more than fifty years had been considered in the South Louisville Roundhouse district, were cut off in force reduction, purportedly under Rule 26 of the skilled employees' agreement and Rule 13 of the unskilled employees' agreement. Immediately following the discontinuance by the Carrier of such operations, the jobs comprising such operations were bulletined by the Carrier. Some of such jobs were bid in by other employees of the Carrier junior in seniority to petitioners. The remaining jobs were by the Carrier assigned to junior employees or assigned to some of petitioners with a new seniority dating of February 18, 1957. In the reduction of forces and restoration of forces, petitioners' seniority was not protected as required by Rule 29 and Rule 31(e) of the skilled agreement and Rule 10 and Rule 14(e)

of the unskilled agreement. Employees junior in seniority to petitioners (some of whom have been brought in from outlying points) are now doing their work. Petitioners have continued to do the same kind of work and in the same places as prior to February 18, 1957, but have been assigned to less desirable shifts and hours of employment and their seniority now stands only as of February 18, 1957, though many of them have more than thirty years' seniority.

2. Notwithstanding the Carrier purportedly abandoned the South Louisville Roundhouse and discontinued all mechanical operations thereof, it continues to maintain seniority rosters for the Roundhouse district and petitioners have the same seniority standing thereon as prior to February 18, 1957. Nevertheless their employment since that date has been upon the basis of seniority in the South Louisville Shops as of February 18, 1957.

3. The Carrier has refused to dove-tail the seniority of petitioners in with the employees of the South Louisville Shops, as of that date, and the Unions, being the bargaining representatives of the crafts to which petitioners belong, have refused to request of the Carrier the dove-tailing of petitioners' seniority with said South Louisville Shop employees.

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4. QUESTIONS UPON WHICH AN AWARD IS SOUGHT.

(a) Under the respective agreements in force, can the Carrier deprive petitioners of their seniority standing under the pretext of discontinuing jobs and reducing force, when the same work is being done as before and in the same places?

(b) Are not petitioners entitled to be dove-tailed in seniority with other employees of the South Louisville Shops, if their work continues to be assigned to said Shops?

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EMPLOYES' STATEMENT OF FACTS: (1) On February 4, 1957, the carrier posted on the Bulletin Board of its South Louisville Roundhouse, Bulletins No. 39, No. 41 and No. 42 and on February 5, 1957, posted Bulletin No. 40. Each Bulletin bore the name of J. A. Parrish, who at said time was and now is the carrier's master mechanic for its Louisville Division, and was directed to all employes concerned.

2. Each Bulletin announced as follows:

> "Effective at the close of work of the third shift, February 17, 1957, all Mechanical operations of the South Louisville Roundhouse will be discontinued.
>
> All roundhouse forces will be laid off in keeping with Rule 26 of the skilled employes agreement, and Rule 13 of the unskilled employes agreement.
>
> As a result of the foregoing, the following employes will be cut off in force reduction."

3. Here appeared the list of employees with their respective seniority dates who were cut off in force reduction.

4. Bulletin No. 39 named the machinists cut off from their former jobs, Bulletin No. 40 named the electricians, Bulletin No. 41 named the pipefitters and Bulletin 42 named the laborers.

5. As of January 1, 1957, the carrier posted on its bulletin board at its Louisville Terminal (which is the same seniority district as the South Louisville Roundhouse) its mechanical department seniority roster revised as of January 1, 1957. Said roster showed thereon the name of each of petitioners with his correct seniority date, being the same seniority date as that shown on Bulletins Nos. 39, 40, 41 and 42 with respect to the employes named therein and being the same seniority date as shown in part No. 1 hereof "Parties to Dispute".

6. Effective as of February 18, 1957, petitioners were given a seniority dating at the South Louisville Shops as of

February 18, 1957. The work performed for the carrier by the petitioners in their respective crafts since February 18, 1957, has been on the basis of the seniority dating from that date.

7. Within ten days from the effective date of Bulletins Nos. 39, 40, 41 and 42 and in keeping with Rule 26(c) of the skilled employes' agreement and with Rule 14 of the unskilled employes' agreement, each of petitioners filed with J. A. Parrish, master mechanic of the carrier at Shop No. 17, Louisville, Kentucky, with a copy to the general chairman of the shop union representing his craft, a written protest against the discontinuance of his job at the South Louisville Roundhouse pursuant to the carrier's bulletin applicable to his craft and referred to above. The written protest gave petitioner's name, his craft in which employed and the seniority date in his classification. Each petitioner in said written protest requested the protection of his seniority and his employment in his qualification (as machinist, pipefitter, electrician or laborer, as the case might be) in keeping with his seniority. Each written protest bore the name of the employe together with his address. A copy of the form of the written protest so used by each of said petitioners is filed herewith to be read as part hereof. The blanks were appropriately filled in by each of petitioners.

8. Within sixty days from the placing of each of petitioners' names on the seniority roster of the South Louisville Shops, and in accordance with Rule 29(c) of the skilled employes' agreement and Rule 9 of the unskilled employes' agreement, each of said petitioners filed with J. A. Parrish, master mechanic of the carrier, at Shop No. 17, Louisville, Kentucky, with a copy to the general chairman of the union representing the craft to which each of said petitioners belonged, a written protest against the placing of said petitioner's name on the seniority roster of the South Louisville Shops with a dating of February 18, 1957, and reques-

ted that his seniority standing on said roster be changed to show his true seniority. A copy of the form of the written protest so used by each of said petitioners is filed herewith to be read as part hereof. The blanks were appropriately filled in by each of petitioners.

9. On March 4, 1957, Marshall P. Eldred, counsel for petitioners, wrote and mailed to J. A. Parrish, master mechanic of the carrier's Louisville Division, with copies to J. F. Ryan, chief mechanical officer of the carrier, and W. R. Winkler, superintendent of the carrier's Louisville Division, a letter with reference to Bulletins Nos. 39, 40, 41, and 42 and requesting advice with respect to the seniority standing of each of petitioners whose names appeared on said bulletins, effective as of the date of said letters.

10. In response to the letter mentioned in the preceding paragraph, counsel for petitioners received a reply dated March 25, 1957, from W. S. Scholl, the carrier's director of personnel, advising that seniority rosters were being maintained for the roundhouse district and that petitioners' names appeared on the list. Counsel was also advised that petitioners whose names appeared on the list attached to counsel's letter of March 4, 1957, had the same standing there and on February 18, 1957, as they had prior to that date. Counsel was further advised that the seniority dating of petitioners at the South Louisville Shops was as of February 18, 1957.

11. Under date of April 1, 1957, Marshall P. Eldred, counsel for petitioners, wrote and mailed to the following general officers of the carrier, to-wit:

John E. Tilford, President.

Z. E. Scott, Jr., Assistant to the President.

W. H. Kendall, Vice-President in Charge of Operation.

W. S. Scholl, Director of Personnel.
J. F. Ryan, Chief Mechanical Officer.
W. R. Winkler, Superintendent of Louisville Division.

a letter advising such general officers of his representation of petitioners. Said letter made reference to Bulletins Nos. 39, 40, 41 and 42 and advised that petitioners had thereafter protested the carrier's action in writing to master mechanic, J. A. Parrish, with a copy to the respective general chairman. Said letter further advised that petitioners had received no response to their protest, that the same work was being carried on in the South Louisville Roundhouse district as before except that said work was being done by men whose seniority standing was junior to that of petitioners. Said letter also referred to counsel's letter of March 4, 1957, to Mr. Parrish and Mr. Scholl's reply of March 25, 1957. The general officers of the carrier named above were further advised in said letter that petitioners had suffered an unauthorized and illegal loss of their seniority which had been acquiesced in and agreed to by the unions representing their crafts. Said letter requested that petitioners be granted a hearing on their protest and that they be restored to the seniority and jobs held by them prior to February 18, 1957, with full restoration of any pay lost since that date. Copies of said letter were sent to:

W. W. Smith, General Chairman of the International Association of Machinists.

Herman Webb, General Chairman International Brotherhood of Electrical Workers.

J. Hugh Whelchel, General Chairman Sheetmetal Workers International Association.

Ray Abner, General Chairman Brotherhood of Railway Shop Laborers.

12. In response to counsel's letter referred to in the preceding paragraph, said counsel received from Mr. John E. Tilford, the carrier's president, a letter dated April 4, 1957, advising that he would have the matter looked into and an investigation made.

13. In further answer to counsel's letter of April 1, 1957, counsel received from H. G. Breetz, an assistant general attorney for carrier, a letter dated April 23, 1957, advising that when all mechanical operations of the South Louisville Roundhouse were discontinued, all positions in that seniority district were abolished by bulletin. The letter further advised that the carrier's action in so doing, as well as all of its subsequent actions, were strictly in accord with the respective bargaining agreements. In this letter, the carrier declined to comply with the requests contained in counsel's letter of April 1, 1957, addressed to the carrier's general officers.

14. About the year 1901 the South Louisville Roundhouse was constructed. About the year 1908 the back shops, now known as the South Louisville Shops, was constructed. Since that time and until February 18, 1957, repairs to locomotives have been done by these two different shops, known respectivyly as the roundhouse and the back shop, and a seniority roster for many years has been maintained for each craft at the South Louisville roundhouse and the South Louisville shops. Each was supervised by its own master mechanic and the two master mechanics were responsible to the superintendent of machinery or chief mechanical officer.

15. The work done by the roundhouse force has been light repairs, running repairs and daily, monthly, semi-annual and annual inspections. The heavy repairs were done by the back shop forces.

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16. For more than fifty years the boundary line between the roundhouse and the back shop has been recognized. It comprised a board fence which stood east of the short line mains as they existed until 1956, at which time the short line mains were moved to the west a short distance and located just east of the site of the roundhouse. The back shop has always been and is now east of this fence. The roundhouse was west of this fence. In 1948, inspection and work pits were constructed west of the boundary fence near the roundhouse and just east of the present location of the short line mains. In 1956 new inspection and work pits were constructed west of the boundary fence and on the site of the short line mains as they existed prior to the move referred to above. A portion of the boundary fence was then removed adjacent to these new inspection and work pits.

17. About 1949 the carrier had acquired so many diesel engines it became necessary to construct new facilities for making repairs. A shop known as the diesel shop or Shop No. 17 was then constructed about 100 feet east of the boundary fence. All of the work, thereafter done in the diesel shop, to-wit: light repairs, running repairs and daily, monthly, semi-annual and annual inspections, was the same work that had been performed in the roundhouse and a part of which continued to be done in the roundhouse until 1956. When the carrier completely dieselized its Louisville Division, it became necessary to install new facilities to handle inspection, general servicing and running repairs of its diesel engines at the roundhouse. The result was the construction of the inspection and work pits referred to in Paragraph 16. Since November 27, 1956, petitioners, constituting the roundhouse forces, have been performing the inspections, servicing and running repairs at these new

pits, maintaining their original seniority rating until February 18, 1957.

18. On July 1, 1956, J. A. Parrish was the master mechanic of the Louisville Division and as such in charge of the roundhouse forces and W. C. Rollings was master mechanic in charge of the forces at the back shop. On that date the carrier extended the jurisdiction of Master Mechanic J. A. Parrish, by including within his jurisdiction the servicing and making of light and running repairs to diesel engines at the diesel shop known as Shop No. 17. Notice of this was issued by the carrier under date of July 1, 1956, signed by W. R. Winkler, superintendent, and approved by J. F. Ryan, chief mechanical officer.

19. Prior to February 18, 1957, petitioners who are machinists performed duties of which the following are typical and illustrative:

(a) Inspections of: Air brake equipment; Windshield wipers; Horns; Bells and bellringers; Air pump governors; Air compressors; Engine governors; Running gear and safety appliances; Supply boxes; Oil and crankcase.

(b) Check of: Federal forms in engines and mileage cards for proper dates and for making record report; Speedometer readings and making record report; Wheels for flat spots; Train control brake test; Unit to unit application and release brake test; Air and water leaks.

(c) Repairs to or replacement of: Locomotive governors; Injectors, nozzles and fuel pumps; Inspection plates and gaskets; Test valves; Nugent lubricating oil filters; Bronze filters; Full flow fuel filters; Water pumps; Shutter assemblies; Thermostats; Engine air filters; Car body filters; Speedometer and cables; Valve tappets; Brake shoes; Gaskets in superchargers; Brake cylinders; Pistons; Packing cups and springs.

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20. Prior to February 18, 1957, petitioners who are sheetmetal workers performed duties of which the following are typical and illustrative:

Check, repair and renew sand pipe and line to rail.

Remove, repair and check bleeder valve, control valve, relay valve, operating valve and clean out wet and stopped up sanders.

Change fuel oil strainers.

Replace missing oil caps.

Replace missing water tank caps and clean and repair water gauges.

Clean and repair water glasses on expansion tanks and renew valves and glasses.

Inspect all pipe work on diesel engines.

Repair water tanks and toilets on diesel engines and fill tanks with water.

Open stopped up sumps and drains on diesel engines.

Disconnect air pumps, governors, shutter cylinders, air magnet valves and anything to which a pipe is connected.

Remove and replace all coverings over pulleys and belts.

Inspect and renew all rubber hose on disel engines.

Renew and repair steam heat connectors on passenger engines.

Inspect and renew all hose connections between units.

Repair sandbox doors and replace same.

Repair bands on exhaust manifolds.

Remove and replace thermostat controls on engines.

Make service runs over the entire Louisville terminal in order to make repairs on switch engines.

Make service runs to 10th Street for repairs on incoming passenger engines.

Repair and renew all air, sand, water, and oil hose at Roundhouse.

Open sand pipe to sanding towers.

Do all welding and brazing for the pipe gang.

Inspect, test and repair all work on steam generators.

Cut engines out and in at 10th Street, cut and couple units and check air.

Check and put oil in steam generator water pumps.

Repair water jumper connections on Alco engines.

Remove water pipe and hose on top of all Alco engines and renew gaskets for same.

Remove and replace all gratings, louvers and panels.

Drain cooling system when necessary for repairs.

Take samples of water for chemical test and add water treatment compound when needed.

Remove and replace defective hot water cab heaters.

21. Prior to February 18, 1957, petitioners who are electricians performed duties of which the following are typical and illustrative:

Make daily, monthly and semi-annual inspections of radio cabooses, including checking battery gravity and battery straps.

Test radio and check alternator belts, visual inspection of terminal belts, voltage regulators and pilot lights.

Test walkie-talkies and replace batteries and antennas when necessary.

Make out monthly inspection cards.

Check battery cells with volt meters and hydrometers.

Wash batteries and flush when necessary.

Check brushes in alternators.

Blow out equipment with dry air and grease idlers.

Check locomotive radios for transmission and reception.

Replace brushes in motor generator sets.

Replace defective transmitters, power supply and receivers.

Check train control work on diesels.

Check and inspect diesel locomotives for lighting, spare lamps, fuses, generators, alternators, power contacters and interlocks, reverses, resistors, air compressor pressure switch, fuel pumps, load regulators, jumper cables, throttle operation.

In Strawberry Yards maintain two—50 horsepower motors and controller, one fuel station pump motor and maintain tower lights and all building lights.

In main yard office maintain one fuel station pump motor and all building lights.

Maintain all lights in Central Avenue building and race horse platform lights.

In east Louisville, maintain fuel station pump motor and one—20 ton overhead crane and all building lights.

22. Prior to February 18, 1957, petitioners who are laborers performed duties of which the following are typical and illustrative:

Operating sand car; Fueling diesels; Hostler helping; Diesel cleaning and running for parts to and from storeroom.

23. On and prior to February 17, 1957, the work detailed in the preceding paragraphs was performed by petitioners in the roundhouse and on the inspection and work pits constructed about the year 1948 west of the boundary fence and west of the short line mains as located until recently moved to their present location just east of the roundhouse site. From November 27, 1956, to February 18, 1957, the work was done by petitioners at the new inspection and work pits located at the site of the old short line mains west of that section of the boundary fence which was torn down at the time of the construction of the new pits. A portion of this work was also done by the petitioners in the South Louisville roundhouse until it was torn down, and a portion has been done at 10th Street Station,

and, with respect to switch engines, all over the Louisville terminal. Since February 18, 1957, the same work has been done on the new inspection and work pits constructed in 1956 at the site of the old short line mains and west of the site of the boundary fence which was torn down at the time of the construction of the pits. Portions of the work are also done at 10th Street Station and, with respect to switch engines, all over the Louisville terminal. Some of this work is now being performed by employes whose seniority is junior to that of petitioners and who have never held seniority in the roundhouse district. Much of the work is still being performed by petitioners on less preferable shifts than those upon which they were formerly employed and all of petitioners are performing substantially the same work as they did before but with seniority dating now only from February 18, 1957.

24. The following tables show the names of petitioners who did this work prior to February 18, 1957, their true seniority dating, the name of the employe by whom this job has been taken and the seniority dating of the employe now doing the work:

MACHINISTS

Name	Seniority	Name of Employe Taking Job	Seniority
J. D. Masden	8 20 22	E. C. Grayson	11 16 53
E. H. Miller	8 22 22	R. L. Masden	1 23 37
R. C. Polk	9 27 22	A. Bingham	10 18 54
F. A. Ernst	9 19 22	R. D. Cummings	1 27 55
W. J. Dietchman	10 6 22	J. Phillips	8 17 54
C. L. Friend	10 7 22	O. Pennington	12 6 55
J. C. Litsey	10 11 22	J. P. Hayden	5 23 45
J. W. Welsh	11 20 22	J. C. Litsey	2 18 57
O. C. Lee	1 25 23	A. E. Fleig	8 21 51
H. W. Olges	3 16 23	L. C. Hagan	2 18 57
C. J. Dietsche	3 29 23	O. B. Ross	2 4 57
Joseph Lord	4 2 23	J. W. Welsh	2 18 57

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Name	Seniority	Name of Employe Taking Job	Seniority
R. E. Reiter	7 26 23	J. C. Lloyd	10/11/56
G. C. Anderson	9/18/23	C. R. Friend	2/18/57
L. C. Hagan	1 22/36	H. W. Olges	2 18/57
E. E. Holselaw	1 22/36	G. W. Metcalf	2/18/57
H. B. Briley	1 22/36	G. C. Anderson	2 18/57
R. C. Sarver	1 22/36	W. A. Moore	1 4 57
J. F. Sheeley	12 1/36	O. C. Lee	2 18/57
G. W. Metcalf	7/ 1/41	E. E. Holselaw	2 18 57

SHEETMETAL WORKERS

Alanzo Taylor	12/15/23	W. L. Thompson	10/27/36
R. L. Fowle	6 15/25	W. D. James	2/18/57
Geo. Siegrist	6/10/28	T. L. Roden	9/ 1/56
W. D. James	1 26/36	Geo. Siegrist	2/18/57
K. L. Putman	12/ 7/36	R. L. Fowle	2/18/57
Leroy Wines	3/23/48	J. A. Masden	2 18/57
J. A. Ballou	4 30/48	Leroy Wines	2/18/57
J. A. Masden	5 1/48	B. L. Burch	3 15/50

ELECTRICIANS

G. H. Farley	11 3/39	J. E. O'Brien	1/29/52
A. P. Roth	1/30/43	E. V. Kroll	5/31/56
A. B. LeMaster	2/23/50	R. G. May	11/ 4/53
J. W. Ritter	9/29/51	G. H. Farley	2 18/57
O. E. Heffner	1/13/52	C. F. Anderson	8/ 4/53
L. W. Steel	5/26/52	L. Merrifield	2 18/57
H. Johnson	3/ 7/53	A. P. Roth	2/18/57
L. Merrifield	7/16/56	M. T. Irvin	2/18/57
L. G. Lewis—Upgraded Electrician	4/22/53	J. A. Fuchs	11/ 1/55

LABORERS

1. I. T. Ferrell	8 19/22	Same Job	2/18/57
2. F. E. Oschner	10/ 6/22	Same Job	2 18 57
3. W. A. Foley	1/20/23	Thadis Day	10 11 55
4. F. T. Wells	3 13/23	E. G. Bush	3/ 3/54
5. C. A. Carter	4 3/23	Sam Holselaw	1 4/23
6. T. Gill	5 16/23	Same Job	2/18/57

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Name	Seniority	Name of Employe Taking Job	Seniority
7. McK. Cross*	6/25/23	G. H. Johnson	6/ 6/22
8. C. W. Jones	9/ 1/23	Same Job	2/18/57
9. Ray Reynolds	9/ 7/23	Promoted to Boiler Shop	
10. H. S. Gentry	1/ 4/24	Same Job	2/18/57
11. Henry Harris	2/ 6/24	Same Job	2/18/57
12. Jos. M. Gordon	2/23/24	J. T. Burton	1951
13. Earl Simpson	3/18/24	Same Job	2/18/57
14. Sam Adams	4/13/24	Same Job	2/18/57
15. J. E. Williams	5/24/24	M. Cross	2/18/57
16. C. E. Ewing	6/16/24	Same Job	2/18/57
17. C. E. Cowman	8/20/24	Filling Vacations	2/18/57
18. Jackson Fry	8/29/24	Filling Vacations	2/18/57
19. C. A. Wiley	10/24/24	Filling Vacations	2/18/57
20. D. L. Boone	12/ 1/24	Jeff. Jackson	1954
21. F. B. Hickman	5/27/25	Filling Vacations	2/18/57
22. J. D. Barnes	10/17/25	Filling Vacations	2/18/57
23. Robert Ballard	2/ 1/26	Filling Vacations	2/18/57
24. Manuel Welsh	3/ 3/26	Filling Vacations	2/18/57
25. Alvin Laird	5/ 4/26	Filling Vacations	2/18/57
26. Revel Williams	5/17/26	Filling Vacations	2/18/57
27. J. G. McGill	9/24/26	Filling Vacations	2/18/57

*Carter and Cross, while replaced by men senior to them, now hold seniority, in their craft, of February 18, 1957. All of the laborers above named, whether replaced by senior men, or by junior men, or whether doing their same work, or whether filling vacations, have a new seniority dating of February 18, 1957.

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POSITION OF EMPLOYES: 1. It is the position of petitioners that they have been deprived wrongfully of their seniority by the carrier and by the unions who represent their crafts in the failure of the carrier, with the approval of the unions, to dovetail their seniority with the seniority of the men on the roster of the South Louisville shops, the same work, to-wit: inspection and running repairs and cleaning of diesel engines, is now being done and has been done since February 18, 1957, at the same place as was done before. Prior to February 18, 1957, petitioners did this work with seniority as shown on the South Louisville roundhouse roster. Since that date many of the petitioners are doing the same work at the same place but on less preferential shifts and with seniority dating only from February 18, 1957. Many of the jobs done by petitioners prior to February 18, 1957, are now being done by men junior in seniority to them and who hold seniority on the South Louisville shops roster.

2. The effect of the action taken by the carrier is this: the same work is being done, the same men are working, not all of them at the same job or shift, but in the shuffle petitioners lost their seniority. When they left work on February 17, 1957, they had their original seniority. When they returned to work on February 18, 1957, they had no seniority. The carrier reduced forces on February 17, 1957, and restored forces on February 18, 1957. In the restoration, petitioners were not restored to service in accordance with their seniority, as provided in Rule 26(g) of the skilled agreement and rule 14(c) of the unskilled agreement.

3. Petitioners do not claim or contend that the carrier had no right to abolish the roundhouse and to consolidate the work theretofore done by roundhouse forces with the work theretofore performed by the South Louisville shops forces. Petitioners recognize the right of management in the interest of economy or efficiency to combine jobs but

they contend that where the same type work is being done at the same location that it is a violation of the agreements to deprive petitioners of their true seniority and arbitrarily assign to them a seniority dating only from February 18, 1957.

4. Petitioners do not contend that they are entitled to perform the work of inspecting, cleaning and making of running repairs to diesel locomotives to the exclusion of the men on the South Louisville Shops roster. They do contend that their names should go on the South Louisville shops roster according to their true seniority and that their seniority standing should be dovetailed in with the standing of the employees whose names appeared on the South Louisville shops roster on February 17, 1957, and that in accordance with such seniority they continue to do the work they did prior to February 18, 1957.

5. The following provisions of the skilled employes' agreement which became effective September 1, 1943, and has been revised to February 1, 1952, are pertinent to petitioners' claims.

Rule 29 of that agreement deals with seniority and reads as follows:

> "Seniority of each employee covered by this agreement will begin from the date and time the employee starts to work."

Rule 29(b) provides that seniority will be confined to the point employed and provides that at Louisville, Kentucky, seniority rosters for machinists, sheetmetal workers and electricians will be maintained at the South Louisville shops and the South Louisville roundhouse.

Rule 29(c) provides that seniority rosters will be revised in January of each year, and will be open to protest and correction for a period of sixty days.

Rule 26 deals with reduction in force.

Rule 26(a) reads as follows:

"When it becomes necessary to reduce expenses, the force at any point or in any department shall be reduced, seniority as per Rule 29 to govern; the employes affected to take the rate of the job to which they are assigned."

Rule 26(c) reads as follows:

"When employes laid off by reason of force reduction desire to retain their seniority, they must file their name and address with the officer in charge and their local chairman not later than 10 days from date cut off. Forms for this purpose will be furnished, to be filled in by the cut-off man, 1 copy for the local chairman and 1 copy for the officer in charge, each of whom will furnish the man a receipt for his notice. The employe will be responsible for advising in similar manner of any change in address."

Rule 26(d) reads as follows:

"Employes whose positions are abolished may, within 4 days after notification, exercise their seniority over any junior employe in their classification. Other employes displaced may exercise their seniority in the same manner. Four calendar days notice will be given the employes whose positions are to be abolished, copy to be given the local chairman. Employes exercising seniority under this paragraph will not be granted leave of absence until they have satisfactorily qualified for such jobs."

Rule 26(g) reads as follows:

"In the restoration of forces employes will be restored to service in accordance with their seniority, if available. Failure on the part of the employe to notify proper officer and local chairman within 10 days after

notice has been mailed to last recorded address of intention to return to work, will be sufficient proof that the employe does not intend to return to work, and his name will be stricken from the seniority list. In case of sickness or other good cause proper leave of absence will be arranged. Copy of notice sent to employe to return to work will be furnished local chairman. Local chairman will also be furnished list of all employes to be restored to service."

6. The following provisions of the unskilled employes' agreement which became effective June 1, 1942, and has been revised to February 1, 1952, are pertinent to petitioners' claims.

Rule 10(a) reads as follows:

"Seniority of employes will be computed from the date the employe's pay starts provided he is employed on sixty days in a period of one year."

Rule 9(a) provides that seniority rosters will be compiled by seniority districts and show the employes' dating in each rank to which he is entitled.

Rule 9(b) provides that seniority rosters will be revised in January of each year and will be open to protest and correction for a period of sixty days.

Rule 13(a) reads as follows:

"When force is reduced, the senior employes in the seniority subdivision shall be retained, unless the Management and the Committee agree that a senior man is not qualified."

Rule 13(c) reads as follows:

"Employes whose positions are abolished may within four days, and employes having line-of-road seniority may within ten days, after notification that their positions will be abolished, displace any junior

employe according to their seniority rights under this agreement. Other employes displaced may exercise seniority in the same order."

Rule 14(a) reads as follows:

"When employes laid off by reason of force reduction desire to retain their seniority rights, they must file their address not later than ten days from time cut off. A form for the purpose will be furnished in duplicate, to be filled in by the cut-off man, one copy to the Local Chairman and the original for the Master Mechanic (or the Assistant Master Mechanic or General Foreman if there be no Master Mechanic), which officer will give the man receipt for his notice."

Rule 14(c) reads as follows:

"In the restoration of forces laid-off men will be returned to the service in the order of their seniority."

7. The reduction of forces by the carrier on February 17, 1957, discontinued the jobs theretofore performed by roundhouse forces. The very next day the jobs were restored and the work theretofore done by roundhouse forces was continued. These jobs were permitted by the carrier to be bid in by men from the South Louisville shops regardless of seniority standing as compared to petitioners, but petitioners were not allowed to bid on the jobs. The jobs that were not bid on were then assigned by the carrier to petitioners with a new seniority dating of February 18, 1957. This is clearly a violation of Rule 26(g) of the skilled agreement and Rule 14(c) of the unskilled agreement.

8. When the carrier purported to discontinue all roundhouse jobs at the close of the third shift on February 17, 1957, petitioners' names appeared on the roundhouse seniority roster. Notwithstanding the purported discontinuance of all roundhouse jobs, the carrier maintained the roundhouse seniority roster intact. On March 25, 1957, the

carrier's director of personnel advised counsel for petitioners that seniority rosters were being maintained for the roundhouse district and that the men whose names appeared thereon had the same standing on March 25, 1957, and February 18, 1957, as they had prior to the latter date. If the carrier purported to discontinue all roundhouse work, why were roundhouse rosters maintained subsequent thereto?

9. Summing up, it is the contention of petitioners that under the rules in effect in both the skilled and unskilled agreements, petitioners have been deprived of their seniority in violation of such agreements in that:

(1) Petitioners hold seniority in the South Louisville roundhouse district covering the entire area west of the boundary fence or the line on which the boundary fence stood for more than fifty years between the back shops and the roundhouse.

(2) The work which petitioners have performed for many years in the roundhouse district comprises inspections, light repairs, running repairs, and cleaning of diesel engines, work which prior to February 18, 1957, had not been done by the back shop forces.

(3) Since February 18, 1957, the type and character of the work and the place of such work theretofore performed by petitioners have remained the same.

(4) The purported reduction of forces in the roundhouse district did not result in the curtailment of any of the work theretofore performed by the roundhouse forces. Men from another district, the South Louisville shops, were permitted to bid for these jobs and petitioners were not permitted to do so. As a result, men who were awarded these jobs have less seniority than petitioners. Where jobs were not bid in, petitioners were assigned to them by the carrier on the basis of seniority dating only from February 18, 1957.

(5) The agreements require reduction of forces to be on the basis of seniority. The seniority of petitioners was not protected in the purported reduction of forces.

(6) Actually there was no reduction of forces inasmuch as the same work continued to be done in the same places. If there was a reduction of forces, there was an immediate restoration of forces.

(7) The agreements in force require the restoration of forces to be on the basis of seniority. The seniority of petitioners was not protected in the restoration of forces.

(8) In short, petitioners have been deprived of their seniority in violation of the agreements.

10. All data contained in or attached to this submission in support of the position of petitioners has been presented to the carrier in connection with this dispute.

(1) Bulletins 39, 40, 41, and 42 were protested in writing to the master mechanic of the carrier by all of the petitioners.

(2) The placing of petitioners' names at the bottom of the South Louisville shops roster was protested by each of petitioners to carrier's master mechanic.

(3) The seniority standing of petitioners in the South Louisville roundhouse district from and after February 18, 1957, was requested of the carrier by petitioners' counsel and advice with respect to such inquiry was given to petitioners' counsel by carrier's director of personnel.

(4) The deprivation of petitioners' seniority was called to the attention of the general officers of the carrier by petitioners' counsel.

(5) The carrier is a party signatory to the skilled and unskilled agreements and familiar with their provisions dealing with the protection of seniority of its employes.

WHEREFORE, petitioners demand:

1. Consideration of their submission hereinabove set forth;

2. An oral hearing of their dispute;

Adjustment Board Award No. 2899

3. An award by the Second Division of the National Railroad Adjustment Board requiring the carrier to restore petitioners to their same seniority held prior to February 18, 1957, with the right on the part of petitioners to perfrom their same jobs performed by them prior to said date, and requiring the carrier to pay to petitioners for any time lost as a result of the deprivation by the carrier of their seniority;

4. All other relief to which petitioners may be entitled.

CARRIER'S STATEMENT OF FACTS: Under date of February 15, 1957, force reduction was made at the South Louisville, Kentucky, roundhouse under the provisions of Rule 26 of the shopmen's skilled agreement and Rule 13 of the unskilled agreement (International Brotherhood of Firemen and Oilers), with all assigned employes cut off.

POSITION OF CARRIER: Carrier denies that petitioners have been denied their seniority rights. Reduction in force was made consistent with the provisions of the applicable agreements and petitioners still retain the seniority rights held by them in the South Louisville roundhouse seniority district.

At the time of the reduction in force in the South Louisville roundhouse the affected employes made application for transfer to the South Louisville, Kentucky, shops. Effective as of February 18, 1957, the petitioners were placed on job assignments and established seniority in the shops as of that date and in accordance with current agreements. They were placed on the seniority roster in their respective classifications in the order of their standing on the roundhouse roster.

There is no rule either in the skilled or unskilled agreements with carrier's shop craft employes which permits of dovetailing of the seniority rosters as suggested by the petitioners.

On January 28, 1957, representatives of the carrier held a conference with all of the shop craft representatives comprising System Federation No. 91, AFL. At that conference these representatives were fully apprised as to the details of the force reduction. Various rules of the applicable agreements were discussed and it was understood that the action to be taken constituted no violation of the bargaining agreements as interpreted by the carrier and System Federation No. 91, AFL.

Rule 145 (a) of the current shopmen's skilled agreement provides:

> "The right to make agreements covering rates of pay and working conditions, and to interpret and apply them, respectively, for the management and the employes herein covered, is retained by the parties signatory thereto. When settlement is not reached by negotiation, the matter concerned may be pursued by further handling under the provisions of the Railway Labor Act."

Rule 145(b) of that agreement provides:

> "The Director of Personnel for the railroad and the General Chairman for the employes, have authority to reach decision on any dispute, grievance, controversy, or difference of opinion affecting this agreement in any manner whatsoever, whether the case comes to them on appeal or otherwise. Decision reached on any such question by mutual agreement under this rule shall be final, and shall not be open to any question thereafter."

Rule 32 of the current shopmen's unskilled agreement provides.

Adjustment Board Award No. 2899

"The rights to make agreements covering rates of pay and working conditions, and to interpret and apply them, respectively, for the Management and the employes herein covered, is retained by the parties signatory thereto. When settlement is not reached by negotiation, the matter concerned may be pursued by further handling under the provisions of the Railway Labor Act.

The Director of Personnel for the railroad, and the General Chairman for the employes, have authority to reach decision on any dispute, grievance, controversy, or difference of opinion affecting this agreement in any manner whatsoever, filed by the employe or employes, whether the case comes to them on appeal or otherwise. Decision reached on any such question by mutual agreement under this rule shall be final, and shall not be open to any question thereafter.

General rulings or interpretations will not be made on this agreement, except in conference held between the Director of Personnel, for Management, and the General Chairman, for employes concerned."

There is no dispute between carrier and System Federation No. 91, AFL, concerning petitioners involved in the South Louisville, Kentucky, roundhouse force reduction. There is, therefore, no merit to the request of the petitioners and it should be denied.

Adjustment Board Award No. 2899

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The grievance herein involves consequences flowing from the closing of the South Louisville Roundhouse, a separate seniority point of the carrier. The claimants in Docket No. 2787-I are employes of the South Louisville Roundhouse, and they advance the primary claim that they are entitled to be dovetailed in seniority with employes of the South Louisville Shops, another separate seniority point.

Seniority rights, including rights to have seniority dovetailed, are created or extended solely by contract or agreement negotiated between the carrier and the duly accredited representatives of the respective craft or class of employes.

The record in Docket 2787-I discloses that no agreement provision for the dovetailing of seniority has been negotiated, or agreed to by the carrier and the duly accredited employe representatives. The seniority rules of the current collective agreement provide only for standard point seniority, which does not call for dovetailing of seniority when a point is closed or abolished.

We find no merit in the contention of the claimants that the South Louisville Roundhouse was not in fact closed or in the contention that the closing of the South Louisville Roundhouse was in bad faith or a subterfuge. When a

point is closed, the work theretofore performed at that point is often transferred to another point, and from all that appears in the record, that is what happened in these circumstances.

The controlling agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1958.

PLAINTIFFS' MOTION TO AMEND FINDINGS OF THE JEFFERSON CIRCUIT COURT.

* * * * * * *

Plaintiffs move the Court to strike from the Court's Opinion of August 25, 1960 the last two sentences in the first paragraph and to substitute in its stead the statements found below.

(s) Joseph B. Helm,
Attorney for Plaintiffs,
511 Marion E. Taylor Bldg.,
Louisville 2, Kentucky,
JUniper 4-4356.

PROPOSED ORDER.

IT IS HEREBY ORDERED that the last two sentences contained in paragraph 1 of the Court's Opinion of August 25, 1960, be and they are hereby stricken and in substitution thereof the following sentences be inserted:

> ". . . Plaintiffs allege that on February 17, 1957, the L. & N. with the express approval of the defendant union discontinued, on paper only, its Roundhouse operations where plaintiffs were employed but, in fact, continued the same jobs at the same locations under the jurisdiction of the South Louisville Shops seniority roster. The employees of the South Louisville Shops were then given priority to bid on the jobs previously held by plaintiffs, the bargaining representatives and the L. & N. having reached the conclusion that plaintiffs would have to go to the foot of the seniority roster of the South Louisville Shops."

ENTERED this ____ day of September, 1960.

_____

Judge.

OVERRULED.
(s) Lampe, J.

PLAINTIFFS' MOTION TO AMEND THE JUDGMENT OF JEFFERSON CIRCUIT COURT ENTERED SEPTEMBER 12, 1960.

* * * * * * *

Plaintiffs, O. C. Lee and others, move the Court to amend the Judgment entered herein on the 12th day of September, 1960 by adding to said Judgment the attached paper entitled Amended Judgment.

Affidavits of plaintiffs, O. C. Lee, Roy Fowle, and K. L. Putman filed herewith are in support of this Motion.

EXCERPTS FROM AFFIDAVIT OF O. C. LEE.

* * * * * * *

Affiant, O. C. Lee, states that he is one of the plaintiffs in this action, that the action is one for declaration of rights as against the defendants Louisville and Nashville Railroad Company, System Federation No. 91 of The Railway Employes Department A.F.L.-C.I.O., International Association of Machinists, Sheetmetal Workers International Association, International Brotherhood of Electrical Workers and International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, as to interpretation of contracts between said defendant Unions and the defendant, Louisville and Nashville Railroad Company, and for an accounting for wages for time lost and for expenses.

Affiant says that the claims as to interpretation of said contracts involve seniority rights of plaintiffs under said contracts, priority in jobs thereunder, priority in working hours, and in selection of vacation periods and other rights, all of which rights are not translatable into monetary valuation.

* * * * * * *

WITNESS my signature this 27th day of September, 1960.

(s) O. C. Lee.

SUBSCRIBED AND SWORN to before me this 27th day of September, 1960.

My commission expires July 15, 1962.

(s) Joseph B. Helm,
Notary Public, Jefferson County,
Kentucky.

EXCERPTS FROM AFFIDAVIT OF ROY FOWLE.

. . . . . .

Affiant, Roy Fowle, states that he is one of the plaintiffs in this action, that the action is one for a declaration of rights against defendant railroad and unions as to the interpretation of a contract as to plaintiff's and other's seniority rights and for an account for wages lost because of wrongful loss of seniority.

. . . . . .

WITNESS my signature this 3 day October, 1960.

(s) Roy Fowle,
Affiant.

SUBSCRIBED AND SWORN to before me this 3rd day of October, 1960.

My commission expires July 15, 1962.

(s) Joseph B. Helm,
Notary Public, Jefferson County,
Kentucky.

EXCERPTS FROM AFFIDAVIT OF K. L. PUTMAN.

* * * * * * *

Affiant, K. L. Putman, states that he is one of the plaintiffs in this action, that the action is one for a declaration of rights against defendant railroad and unions as to the interpretation of a contract as to plaintiff's and other's seniority rights and for an accounting for wages lost because of wrongful loss of seniority.

* * * * * * * *

WITNESS my signature this 3rd day of October, 1960.

(s) K. L. Putman,
Affiant.

SUBSCRIBED AND SWORN to before me this 3rd day of October, 1960.

My commission expires July 15, 1962.

(s) Joseph B. Helm,
Notary Public, Jefferson County,
Kentucky.

AMENDMENT ENTERED OCTOBER 6, 1960, TO THE JUDGMENT OF THE JEFFERSON CIRCUIT COURT.

* * * * * * * *

Judgment of this Court entered on the 12th day of September, 1960 is hereby amended to add the following paragraph:

IT IS HEREBY ORDERED AND ADJUDGED that the amount in controversy as to each of the plaintiffs is in excess of $200.00, exclusive of interest and costs, and as to plaintiffs, K. L. Putman and Roy Fowle is in excess of $2,500.00 each, exclusive of interest and costs.

STATUTES INVOLVED.

Section 3 First (m) of the Railway Labor Act provides (45 U.S.C. § 153 First (m)):

> "(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute."

Section 3 First (p) of the Railway Labor Act provides (45 U.S.C. § 153 First (p)):

> "(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed

a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 149

O. C. LEE, Individually, and J. C. LITSEY, Individually and Both as Representatives of Machinists Employed by Louisville & Nashville Railroad Company at Its South Louisville Roundhouse on February 17, 1957, Et Al.,

Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,

Respondents.

On Petition for Writ of Certiorari To the Court of Appeals of Kentucky

BRIEF IN OPPOSITION FOR RESPONDENTS OTHER THAN LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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Dated at Toledo, Ohio
July 13, 1963

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Respondents.

On Petition for Writ of Certiorari To the Court of Appeals of Kentucky

BRIEF IN OPPOSITION FOR RESPONDENTS OTHER THAN LOUISVILLE AND NASHVILLE RAILROAD COMPANY

QUESTION PRESENTED

Did a state court possess jurisdiction of an action for a declaration of seniority rights under a collective bargaining agreement, brought by railroad employees challenging an interpretation placed upon such agreement by their employer and acquiesced in by their statutory bargaining representatives, after obtaining an award of the National Railroad Adjustment Board contrary to their contentions, in the absence of hostile or invidious discrimination by their bargaining representative or denial of due process by the Board?

STATEMENT OF THE CASE

This action involves an attempt by a group of railroad employees to obtain, by judicial decree, seniority rights and status superior to those which have been accorded them under an interpretation and application placed upon the controlling collective bargaining agreement by their employer, acquiesced in by their bargaining representatives, and approved by the National Railroad Adjustment Board, the statutory administrative tribunal created by Congress to make final and binding determinations of such matters in the railroad industry.

Petitioners and those whom they purport to represent are so-called shopcraft employees of respondent Louisville and Nashville Railroad Company. The respondent labor organizations are the statutory bargaining representatives, under the Railway Labor Act (45 U.S.C. Sec. 151 et seq.), of the respective crafts and classes in which petitioners are employed, and negotiated with respondent Railroad the collective bargaining agreements under which petitioners assert their claim to superior seniority rights and status.

The applicable bargaining agreements provide for what is known as a "point" seniority system, under which an employee's seniority rights are acquired at and limited to the "point" at which he is employed. For many years there existed two separate, though adjacent, seniority points on respondent Railroad's property, known as the South Louisville Roundhouse and the South Louisville Shops. In 1957 the Railroad discontinued operations at the Roundhouse, where petitioners were employed and had accumulated their seniority, and transferred the work to the South Louisville Shops.

The Roundhouse employees were laid off and accorded the status of "furloughed" employees at the Roundhouse

"point". The jobs which opened up at the Shops "point" as a result of the transfer of work were assigned on the basis of established seniority rosters of employees at that point. Petitioners, who held seniority only on the Roundhouse rosters, could only obtain what jobs were left, and established seniority on the Shops' rosters only as of the date they went to work at that point.

Petitioners argued that under the circumstances they were not properly laid off or furloughed, that there had been no legitimate "reduction in force" or closing of a point, and that they were denied their seniority rights under the applicable agreements. The Railroad took the position that its handling of the transaction was the proper interpretation and application of the point seniority requirements of the agreements. Petitioners allege that representatives of the respondent labor organizations agreed that the Railroad's interpretation of the agreements was correct.

Upon being laid off petitioners filed protests which were denied by the Railroad. They thereafter processed their claims to the National Railroad Adjustment Board, Second Division, which considered the dispute on its merits and issued its Award No. 2899 denying petitioners' claim. This action was then brought, seeking a declaration by the court that the Railroad, these respondents, and the Board were wrong in their interpretation of the collective bargaining agreements, and asking protection of petitioners' alleged seniority rights. Suit was expressly brought on the collective bargaining agreements, the complaint describing the action as one "for a declaration of rights under contracts between said defendant Railroad Company and said defendant unions."

The case was presented to the trial court on these respondents' motion to dismiss, and a similar motion to

dismiss, and alternative motion for summary judgment, filed by respondent Railroad, which motions were granted on the ground of the court's lack of jurisdiction of the subject matter. After discussing the well established principles of exclusive jurisdiction of the National Railroad Adjustment Board to determine disputes over the interpretation and application of railroad collective bargaining agreements, and the final and binding effect of its decisions, Judge Lampé in his opinion (Appendix to Petition, pp. 1a-5a) went on to point out the failure of the complaint, as amended, to make out a case of actionable "discrimination" which would avoid the effect of these principles, as well as the lack of substance to petitioners' contentions that the Board lacked jurisdiction of the dispute.

The Court of Appeals of Kentucky, after reviewing the facts and contentions of the parties, recognized the exclusive jurisdiction of the National Railroad Adjustment Board and the finality of its awards, adopted the opinion of the trial court as its opinion, and affirmed the dismissal of the case for lack of jurisdiction. (Appendix to Petition, pp. 9a-11a.)

ARGUMENT

There is nothing in the record herein or the arguments advanced by petitioners to warrant a review of the decision below by this Court.

Under the heading "Reasons for Granting the Writ" (p. 19) petitioners have simply urged that their seniority ought to have been dovetailed. The only statement in the Petition of any basis for granting the writ is the general allegation at page 11 that " . . . the Court of Appeals of Kentucky has decided the questions as to the jurisdiction

of the Court to hear this action different from, and contrary to, applicable decisions by this Court."

Contrary to the assertions of petitioners, we submit the dismissal of this action for lack of jurisdiction not only did not conflict with, but was clearly required by the applicable decisions of this Court.

Exclusive Jurisdiction of the Adjustment Board and Finality of its Award

Petitioners have cited a number of decisions in support of their argument that the courts, including the Kentucky courts, have in the past undertaken to protect rights under collective bargaining agreements, recognizing them as "property" and hence susceptible of judicial enforcement. But it is now so well established as to be beyond argument that insofar as collective bargaining agreements in the railroad industry are concerned, the jurisdiction of the courts, both state and federal, was terminated in 1934 when Congress amended the Railway Labor Act (45 U.S.C., Sec. 151 et seq.) to create the National Railroad Adjustment Board for the specific purpose of settling disputes over the interpretation and application of those agreements.

The leading decisions of this Court in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, and *Order of Railway Conductors v. Southern R. Co.*, 339 U. S. 255, decided April 10, 1950, have been uniformly followed in numerous subsequent decisions of both state and federal courts.

That the present dispute is precisely the sort over which the statute gives the Board jurisdiction is apparent not only from the language of the amended complaint, but also from the repeated assertions in the Petition describing the action as one for a declaration of rights under existing

collective bargaining agreements. (Petition, pp. 3, 6, 8, 17-18, 24, 41.) Thus at the outset, petitioners state (p. 6):

> "In this action, petitioners are asking, for themselves and the rest of the sixty-six employees on the Roundhouse rosters, a *Declaration of Rights* in a controversy with the Louisville and Nashville Railroad Company and with the four International Associations or Brotherhoods and their joint agency, System 91: *under said collective bargaining agreements.* The *only* claims made herein by the 66 men on the Roundhouse rosters, *are the specific contract rights to seniority* . . . " (Emphasis supplied.)

Similarly, the argument of petitioners concludes (p. 41) with the statement that they are entitled to have:

> " . . . a judicial declaration of rights in regard to the bargaining agreements which were in effect on February 18, 1957 and remain to this day with no changes therein."

There is no question here, of course, of petitioners' claims falling within the "wrongful discharge" exception to the *Slocum* doctrine, illustrated by *Moore v. Illinois Central R. Co.*, 312 U. S. 630. They were not discharged but sue as employees, under the applicable collective bargaining agreements, seeking to establish rights to seniority status and attendant benefits superior to those which they currently possess under the agreement interpretation which they challenge.

At the outset of this dispute petitioners apparently recognized the necessity of submitting their claims to the Board. They processed the dispute, with competent counsel representing them, through a hearing and decision on the merits by the Board's Second Division.

This Court has made it very clear that the *Slocum*

doctrine is not simply one of exhaustion of remedies as a prerequisite to a court determination on the merits of these disputes, but is in fact a substitution of a system of final settlement of disputes by administrative tribunals rather than litigation and judicial determination. *Union P. R. Co. v. Price*, 360 U. S. 601. As the Court noted in *Brotherhood of R. T. v. Chicago River & I. R. Co.*, 353 U. S. 30, and *Brotherhood of L. E. v. Missouri-Kansas-T. R. Co.*, 363 U. S. 528, the Adjustment Board procedure constitutes a system of compulsory arbitration for this type of dispute.

In attempting to escape the binding effect of the Adjustment Board's adverse award petitioners, although having initially sought relief from the Board, now claim that it had no jurisdiction to resolve the dispute because it was a union-membership controversy, and because it related to future operations of the Railroad. Both of these contentions are without substance.

As to the first, it is clear that the action complained of was that of the Railroad. Indeed, in the portion of their argument immediately preceding their categorization of this as a union-membership controversy, petitioners state that "... the *carrier* initiated the contract violation and actively caused the discrimination." (Petition, p. 34; emphasis supplied.) An employee's claim of a contract violation by a railroad is not removed from the Board's jurisdiction simply because the union is in accord with the interpretation which the railroad has placed on the contract. *Hippensteel v. System Federation No. 9*, 337 Mich. 351, 59 N. W. (2d) 278, *Rose v. Great Northern Ry. Co.*, 268 F.(2d) 674. Petitioners' argument to the effect that any question of contract interpretation which an individual employee wishes to dispute with his employer and union may be thrown into the judicial arena, would completely thwart "the superseding purpose of the Railway

labor Act to establish a system of compulsory arbitration for this type of dispute." (*Brotherhood of L. E. v. Missouri-Kansas T. R. Co.*, 363 U. S. 528, 531.)

Petitioners' second contention, that disputes involving future operations of the Railroad are not within the Board's jurisdiction, is diametrically opposed to this Court's decisions. In *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 242, the Court emphasized the importance of having the Adjustment Board decide disputes the settlement of which " . . . would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties." The reservation to the courts of the wrongful discharge type of case represented by the *Moore* decision was justified on the ground that such an action " . . . does *not* involve questions of future relations between the railroad and its other employees." (339 U. S. 344; emphasis supplied.) See also *Pennsylvania R. Co. v. Day*, 360 U. S. 548.

Finally, petitioners' contention that the Board did not in fact decide the questions submitted to it, and upon which they asked the Kentucky courts to pass, is readily refuted by reference to the Board's Findings, as set forth at pages 14a-15a of the Appendix to the Petition. As the Board pointed out, the nature and scope of seniority rights is determined by the contract creating them. (*Trailmobile Co. v. Whirls*, 331 U. S. 40, 53, footnote 21 and cases cited; *Elder v. New York Cent. R. Co.*, 152 F.(2d) 361.) Contrary to petitioners' arguments that they should have been given dovetailed seniority in the Shops on the theory that they were in the same "place" as the Roundhouse, and seniority was based on "geographical area" (Petition, p. 39), the Board plainly held that under the agreement these facilities constituted two separate seniority points.

"Question (a)" (Petition, p. 37) submitted to the Board was plainly answered by it; the answer being that contrary to the assumption stated in the question, that the work was being done "in the same places", it was not being done in the same places for purposes of the contractual seniority system.

Absence of any Actionable Discrimination

By liberal use of the word "discrimination", petitioners seek to escape the impact of the Board's exclusive jurisdiction and its adverse award. Although both the original and amended complaints, as well as the Petition herein, make it clear that the present action relies on, rather than challenges, the agreements between the Railroad and the bargaining representatives, and that the matter in dispute is simply the question of the proper interpretation of those agreements, petitioners rely upon cases involving joint action by a union and railroad to deprive Negro employees of rights accorded to their fellow white employees, either by formal written agreements spelling out the different treatment to be accorded (*Steele v. L. & N. R. Co.*, 323 U. S. 192), or by verbal understandings that contract rights superficially accorded to all employees would be denied Negroes by the expedient of having the union refuse to process their complaints, while enforcing the rights of white employees. (*Conley v. Gibson*, 355 U.S. 41.)

The inapplicability of these cases is immediately apparent. Here, there is no allegation of any hostile or unlawful motive on the part of respondents. No criterion, such as race, or union membership or non-membership, is asserted as being the basis for any discrimination. There is no showing of anything in the contracts, written or ver-

bal, which differentiates or distinguishes between or accords unequal rights to, employees similarly situated. There is no claim that the applicable provisions of the agreements sued upon have been interpreted more favorably for other employees than for petitioners.

Here, aside from alleging the bare conclusion of "discrimination", the only thing petitioners have accused respondents of is that they did not agree with petitioners as to the proper interpretation and application of the point seniority provisions of the bargaining agreements. And while petitioners urge that "the issue of discrimination before the Court in this action has not been heard or determined by that Board" (Petition, p. 10), the express purpose of the present action is to obtain a declaratory judgment in effect reversing the Board's ruling as to the correct agreement interpretation.

The fact that the point seniority system prescribed by the agreements may have had an unfavorable effect on petitioners, which a different seniority system might not have had, does not mean that they have been the victims of hostile or invidious discrimination. What has happened to them has simply been a result of the operation of the "point" seniority system prevalent in the railroad industry. For years they enjoyed the protection afforded by that system, against being displaced by older employees who might be laid off at other "points" on the railroad. Under a different system, such as division-wide or carrier-wide seniority, they might have had "bumping", or "displacement" rights at the South Louisville Shops; but in the meantime, over the years, they would have been subject to being "bumped" at the Roundhouse. But whichever system were adopted, its results would not constitute actionable discrimination.

It is apparent that if petitioners' contentions as to jurisdiction of the courts over their "discrimination" charges were upheld, then all an employee would ever have to do, to defeat the exclusive and final jurisdiction of the Adjustment Board, would be to say that because he disagreed with the manner in which the contract had been interpreted and applied, and because its application was less favorable to him than that which he claimed to be proper, he was being "discriminated against". Such clearly is not the law.

Finally, petitioners appear to contend that the acquiescence of their bargaining representatives in the Railroad's interpretation of the agreements constituted discrimination. But as the trial court so aptly put it, " . . . freedom from discrimination does not require that the union in every grievance agree with its aggrieved member." (Appendix to Petition, p. 4a.) Indeed, we can think of nothing more disruptive of stable labor relations, or productive of complete chaos in the administration of collective bargaining agreements, than a requirement that a union must process each and every employee grievance, whether it thought it had merit or not, whether or not it was consistent with previous interpretations of the agreement, and whether or not it conflicted with contentions of other employees who might be unfavorably affected if the claim were sustained, and would in their turn demand their right to be represented.

Absence of any Denial of Due Process by the Board

In this action petitioners attacked the award of the Adjustment Board not on the basis of any denial of a full and fair hearing, lack of notice, or any other defect amounting to a denial of due process, but essentially on the basis

that it constituted an erroneous interpretation of the collective bargaining agreements which should be remedied by the courts in the "declaration of rights" under those agreements which is sought here. For the courts to have entertained such an action would, as we have noted, have been in direct conflict with the decision of this Court in *Union P. R. Co. v. Price*, 360 U. S. 601.

In the *Price* case, after discussing the intent of Congress to foreclose litigation over disputes of this sort, the Court stated that aside from the statutory right of action to enforce favorable awards of the Board, the only remaining area of litigation contemplated was "the review sought of an award claimed to result from a denial of due process of law, see *Ellerd v. Southern Pacific R. Co.*, 241 F. (2d) 541; *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F. (2d) 579, 582." (360 U. S., 616.)

In the *Ellerd* case, the court summarized its findings on this point as follows:

> "The sound conclusion to be drawn from the statute and the various decisions, seems to be that, in the absence of any question as to the regularity of proceedings before the board, for lack of notice or other defect preventing due process of law, the district court has no right to review an order of the board. If that body has jurisdiction and proceeds according to constitutional guarantees, its decision is, in the words of the statute, final." (241 F. (2d), 544.)

Other decisions to the same effect were cited by the court in the *Ellerd* case.

Similarly, in denying the right of review in the *Barnett* case, the court said:

> "There is no allegation, however, that the Board refused to hear his complaint, that it failed to give

notice of its hearing or any other allegations which point to a violation of procedural due process." (245 F. (2d), 581.)

And the court concluded that cases preserving the right of review if the Board had acted unconstitutionally or gone outside its jurisdiction "are not in point in this case which is a plain challenge to the decision reached by the Board on the merits of the plaintiff's claim." (245 F. (2d), 582.)

Neither the complaint nor the amended complaint herein contained any allegations of denial of due process by the Board. In the absence of such allegations, petitioners may not obtain a court review of the claims which they unsuccessfully urged before the Board.

CONCLUSION

In the foregoing discussion we have shown that the present dispute is one with respect to the proper interpretation and application of a railroad collective bargaining agreement which lies within the exclusive jurisdiction of the National Railroad Adjustment Board; that it was submitted to that tribunal by petitioners and decided adversely to their contentions; and that the Board's decision is final and conclusive, and not subject to the judicial review on its merits which petitioners sought in their complaint for declaratory judgment. We further pointed out the absence of any element of actionable discrimination which would obviate the Board's exclusive jurisdiction, or any denial of due process by the Board which would support judicial review of its award.

The application of these principles by the courts below, and the dismissal of the action for want of jurisdiction, were in complete conformity with the controlling decisions

of this Court. It is accordingly submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all other parties hereto by mailing copies thereof via United States mail, first class postage prepaid, addressed to each of the following attorneys of record:

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July 13, 1963

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. [redacted] 149

O. C. LEE, ET AL., - - - - - - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL., - - - - - Respondents.

REPLY BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 1120

O. C. LEE, ET AL., - - - - *Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL., - - - *Respondents.*

REPLY BRIEF FOR PETITIONERS.

May it please the Court:

The Louisville and Nashville Railroad Company, one of the respondents herein, has been a long time responsible employer. Both to its employees and to its customers it has become familiarly known as the "Old Reliable". Believing that this Company is still a responsible employer, petitioners have continued to work for this Company despite their being deprived of their time-earned seniority rights in jobs by a material *change* in a bargaining agreement under a pretext of an "agreed interpretation". So far they have been penalized by sticking by their employer.

FACTS OMITTED IN RESPONDENT L & N'S BRIEF.

The reputation for reliability has suffered a further challenge in the so-called counter-statement of the case in that Respondent's Brief. Petitioners have tried hard to present the facts as they occurred and exist. It has been most disappointing to petitioners, who have only been seeking what they believe to be their contract property rights, to have the Brief for their employer infer, or insinuate, that petitioners have misrepresented any facts. We fear that attitude of the Employer may have prevented the trial court and the Kentucky Court of Appeals from seriously considering the real issue.

That Brief on page 5 discusses the seniority rosters maintained by the Railroad Company for two adjoining shop yards. These were maintained for both districts for many years, with seniority therein carefully observed up to February 18, 1957. Petitioners were the employees listed on the mechanical rosters of the South Louisville Roundhouse.

Respondent, L. & N.'s Brief says on page 5: "The seniority of the employees at the South Louisville Roundhouse was purely geographical or what is known as point seniority."

This statement is entirely correct. But the rest of the sentence says "this seniority did not entitle them to follow the work from one seniority district to another". This latter part of that statement indicates that respondent considers that petitioners are asking in this case for an extension of rights to a geographical

area other than the one in which petitioners had worked for years and had their well earned seniority. A quick reference to Petitioners' Complaint would have enabled Respondent and its counsel to see the actual issue herein, and to avoid this misleading statement. Petitioners have at all times sought in this action only their seniority rights in the geographical area known as the "South Louisville Roundhouse". The Complaint in Equity states in part:

(T. of R. 30-31, Par. 25)—

"25. Despite the wording of the four bulletins in regard to force reduction, every position then being held by an employee on the South Louisville Roundhouse Roster was continued in operation. Immediately after the posting of the bulletins in regard to laying off the employees mentioned in four bulletins, the defendant Railroad Company advertised the specific jobs held by these employees on the bulletin board of the South Louisville Shops, without any such advertisement being posted on the board of the South Louisville Roundhouse. By February 13, 1957 all jobs desired by any employes listed on the Roster of the South Louisville Shops, which had previously been held by employes listed on the Roster of the South Louisville Roundhouse, were bid in and given to said employes of the South Louisville Shops, except a few jobs for which there were not employes at the South Louisville Shops available and desiring such assignments. * * *"

(T. of R. 31-32, Par. 26)—

"26. There was no discontinuance of any location of work by defendant Railroad Company

and no reduction in force made on February 18, 1957. The Action of the defendant Railroad Company in transferring the jobs in which the plaintiffs and the employees they represent was not authorized by Rule 26 of the skilled employees' agreement or Rule 13 of the unskilled employes' agreement, because there was in fact no reduction in force. Neither was the action of the defendant Railroad Company in giving these same jobs at the same locations to persons on another seniority Roster authorized by Rule 26 of the skilled employes' agreement or Rule 13 of the unskilled employes' agreement, because said employes were entitled, after being laid off, to priority in the restoration of forces laid off under the provisions of Rule 26(g) of the skilled employes' agreement and Rule 14(c) of the unskilled employes' agreement."

(T. of R. 33-34, Par. 30)—

"30. There was no abolition of any seniority point of the defendant Railroad Company or of any location or area being used by defendant Railroad Company in the servicing of its mechanical equipment as had been performed for more than fifty years at the location known as South Louisville Roundhouse. The action of the defendant Railroad Company was in fact only a discrimination against employes by allocating jobs at the South Louisville Roundhouse, not to those who had seniority in the performance of those same jobs at the same location, but to other employes who had lesser seniority and who had not theretofore been employed at all at the location used by the defendant Railroad Company as its South

Louisville Roundhouse. In fact the defendant Railroad Company merely took all work away that had theretofore been rendered by said employes and permitted them to work only by taking an entirely new seniority standing.

"In laying off plaintiffs and the other employes whom they represent, and in refusing them re-employment under the seniority list for the South Louisville Roundhouse, defendant Railroad Company has arbitrarily discriminated against all employes on said Seniority Rosters for the South Louisville Roundhouse, despite the many years of faithful service by said employes and deprived said employes of the rights which they had earned over years of hard labor for said defendant. Said acts of said defendant Railroad Company are in violation of said union contracts, in violation of the Railway Labor Act as amended; and arbitrarily deprives said employes of their property rights."

As specifically alleged, the Railroad Company laid off all the Roundhouse employes. Yet it continued to have the same work done in the exact area which up to that time had been the Roundhouse Shops, using employees from other rosters. Petitioners insist that the Roundhouse area could not be changed to the Louisville Shops area by mere work bulletins. This area was still geographically the Roundhouse area. Respondent's Brief *omits any statement that the location where petitioners worked up to February 17, 1957* and the *location in which their* Complaint sought, and petitioners still seek, the regulation of petitioners' seniority rights, are *exactly the same* area.

Of course the Louisville Shops area still includes the old Shops location, but the Railroad Company's Brief takes the position that the work of the Roundhouse had been transferred to the Louisville Shops although performed on the same ground as prior to February 18th, 1957. The Complaint makes no claim for any rights for petitioners in any area, point or location, except that which had up to February 18, 1957 been in the Roundhouse seniority area (or district).

The Brief for the Railroad Company says on pages 5 and 6 "The South Louisville Roundhouse has been torn down due to the entire dieselization of the railroad (18b, 22b)." So it has, but that fact has no significance in this action. That building was torn down in 1956 or before, when the new work pits were constructed. This fact appears in the record before the National Railroad Adjustment Board, paragraph 17 and 23. Despite the fact that a roundhouse was not needed for dieselized engines, work continued in the Roundhouse area—performed only by employees on the Roundhouse rosters—until February 18, 1957.

For some unexplained reason the Railroad Company and Unions found that a contract which for fifteen years or more had meant that the seniority in the Roundhouse area belonged to the rosters for that area, did not mean this any more. By some magic touch the Railroad Company had abolished the Roundhouse area and just combined that particular ground into the Shops area. At that magic moment the bargaining agreement carried no longer any seniority rights in this particular territory for the employees

on the seniority roster. Theoretically the Roundhouse District had been abolished and all the territory moved into the Louisville Shops District. Men on the Louisville Shops rosters then had the seniority rights to the jobs in both the former areas, while men on the Roundhouse rosters had no rights. *They were furloughed*, but if any jobs in the territory formerly in the Roundhouse area were not desired by persons on the Louisville Shops rosters the employees on the Louisville Roundhouse rosters could start anew, with the seniority of a brand new L. & N. employee, in the geographical location where they had worked the day before.

On page 6 of the Counter-Statement of The Case this statement is made.

"The South Louisville Roundhouse seniority rosters continue to be maintained so that, if mechanical operations are reestablished there, the employees on those rosters may perform such work at the seniority point in accordance with these seniority rights (8b-9b)".

This is a prize statement of the L. & N.'s position. Why are these rosters maintained? With all of the Roundhouse area included within the boundaries of the South Louisville Shops area where can these useless rosters be posted?. They have not been used since February 17, 1957. Where could mechanical operations be reestablished, with the entire area now being included within the Louisville Shops District. The Railroad Company's counsel should realize this fact because they filed the Affidavit of Mr. W. S. Scholl so stating, and

they filed the Transcript of the National Railroad Adjustment Board proceedings, which contains the statement in the first paragraph that:

> "Immediately following the discontinuance by the Carrier of such operations; the jobs comprising such operations were bulletined by the Carrier. Some of such jobs were bid in by other employees of the Carrier junior in seniority to petitioners. The remaining jobs were by the Carrier assigned to junior employees or assigned to some of petitioners with a new seniority dating of February 18, 1957."

Counsel for the Respondent, L. & N. Railroad Company, can also learn these facts from reading the Complaint and they can ascertain that the same type of work has been carried on in the former Roundhouse area yards daily ever since February 17, 1957.

The Railroad Company must have some purpose in continuing to maintain these Roundhouse District rosters. To that limited extent it is conscientiously observing its written bargaining agreement. But the admission or bragging, that it is still maintaining the rosters, indicates that it believes the contract requires it to do so and that the rosters have some significance. At least it is a memorial to the fact that up to February 17, 1957 the Railroad Company correctly interpreted its written contract, with fair treatment for the employees whom it has now furloughed without a hope.

It has not pointed out, however, in what geographical area these seniority rosters have any significance

and the maintaining of these rosters is certainly inconsistent with the interpretation which the Railroad Company now places on the contract provision. Maybe the Railroad Company's conscience is consoled somewhat by keeping a list of 66 employees for whom on February 18, 1957 it had no further jobs, just rosters kept for a maybe.

The Brief for the Railroad Company says on pages 6 and 7 under the Counter Statement of the Case that

> "The Roundhouse employees were dissatisfied because the seniority accumulated by them in the South Louisville Roundhouse seniority district was not carried over by them into the seniority district of the South Louisville Shops and they protested to the railroad (5b, 9b)."

This is partly correct, but only incidental to the petitioners' real contract rights. If work in the area formerly known as the South Louisville seniority district had been entirely discontinued, petitioners might have sought to follow the work into the area of the South Louisville Shops. But that wasn't the situation. When work continued as before February 18, 1957 in the Roundhouse seniority district, with South Louisville Shops employees only working there, petitioners sought the same privileges which Respondent gave to the employees on the Shops rosters. That is what, in a sense of fair play, the Railroad Company might have accorded to them, either before or when they went to the National Railroad Adjustment Board.

But the Railroad Company had become technical. The contract carried no right of dovetailing. The

Adjustment Board was strictly correct in deciding that, and in denying this relief. But even *it could* have used its good offices in the interests of fair play. Instead it seems to have been more impressed by the final statement by the Carrier to the Board that:

> "There is no dispute between carrier and System Federation No. 91, AFL, concerning petitioners involved in the South Louisville, Kentucky, roundhouse force reduction. There is, therefore, no merit to the request of the petitioners and it should be denied."

Then the Counter-Statement says that petitioners conceded that the Railroad Company had the right to abolish the Roundhouse. Petitioners have not been trying to manage the railroad. They will even concede the right to abolish a geographical district. But they do not concede the right to combine two districts (abolishing neither work area) to the prejudice of the contract rights of the employees on the seniority rosters of either district. That is what the Railroad Company has done. And there has not ever appeared any valid reason whatever why it could not, or did not, respect the contract rights of employees on both sets of rosters.

The same unions represented the craftsmen on both sets of rosters. They could certainly represent both sets of employees, if they had so wished.

The Counter-Statement says that the L. & N. believed its actions were strictly in accord with the applicable collective bargaining agreements. Possibly the negotiators overlooked the contract rights to senior-

ity of the employees who were furloughed (but saw other employees take their same jobs at the same geographical location). Their counsel must have strained their conscience in overlooking these contract rights.

REASONS FOR GRANTING THIS WRIT.

In the Petition for a Writ of Certiorari in this case, Petitioners pointed out that this action involves the claimed violation of Section 1 of the Fourteenth Amendment to the United States Constitution. It further involves a statutory provision being Section 153 of Title 45 U. S. Code. Copies of these constitution and statutory provisions are contained in Item 5 of the Appendix to the Petition for Writ of Certiorari.

This action really furnishes a test case as to whether a railroad company which has established long ago a system of point seniority rosters for specific areas for mechanical shops, can furlough all employees at "Point A" established for over 50 years and then (secretly or openly) immediately move the boundaries of "Point B" so as to include all the area which had long been in "Point A", then deny to these furloughed employees any seniority rights in the territory formerly included in "Point A". This statement on its face indicates that it constitutes a deprivation of contract rights from the employees on the "Point A" rosters. But the employees on those rosters have had insult added to injury when they were told that they could work at their old location *with no accrued seniority*, if the employees on the rosters of another *point* didn't want the jobs.

A. Status of This Action in Trial Court.

Petitioners in this action were 66 employees listed for years on the rosters of the South Louisville Roundhouse District of the Louisville and Nashville Railroad Company. These 66 employees had seniority in the various mechanical crafts working in the Roundhouse Shops. The collective bargaining contracts which had been in effect since 1942 or 1943 created property rights to seniority in the Roundhouse District. Petitioners had enjoyed the benefit of the seniority which they had earned over various periods of years as are recited in the Complaint in Equity filed in this action (T. of R., p. 27).

The activating cause for this action was a change in the interpretation of the contract, suddenly sprung upon the Petitioners by bulletins announcing that each of these 66 employees (being all of the employees on all the Roundhouse District rosters) were to be furloughed effective February 17, 1957. In this action Petitioners claim that any such sudden and revolutionary change in the interpretation of a collective bargaining agreement amounted to an actual unwritten amendment to the contract to cover the situation upon the Respondent Railroad Company combining two established points or districts having separate seniority rosters.

Petitioners claim that no such alterations in the collective bargaining agreement were ever adopted by the parties to the contracts, and any attempt to change the operations and operating conditions in the area in

which the Roundhouse District was located, constitute violations of the contract as regularly adopted and still effective.

Petitioners brought this suit for and on behalf of all the 66 employees who were furloughed on February 17, 1957 and who have been deprived ever since of all rights under the rosters which were in effect on January 1, 1957 and thereafter.

Petitioners insist that the Jefferson Circuit Court has jurisdiction to determine the right of the parties for violation of the contract by arbitrary discrimination in the Roundhouse District area against the employees listed on the Roundhouse seniority rosters and in favor of employees in the same crafts from other seniority district rosters.

The Chancellor in his opinion directing that the Complaint be dismissed for lack of jurisdiction, based this decision upon the fact that the Board's jurisdiction is exclusive and that its orders are final. The Kentucky Court of Appeals in its opinion dated November 2, 1962 says that the National Railroad Adjustment Board has exclusive jurisdiction and its decision in this class of disputes is final. The Court of Appeals likewise held that the Board has exclusive primary jurisdiction of such controversies and that its decisions in this class of disputes is final. All that means that the Petitioners in this action are deprived of any opportunity whatever for a consideration of their claims of contract violations depriving them of property rights which the Fourteenth Amendment to the United States Constitution protects. The Petitioners

recognized that to bring an action in the courts of Kentucky they must, as required by the Kentucky Court of Appeals, exhaust the procedural remedies available. They did this.

One of the administrative steps which Petitioners thought to be necessary was an application to the National Railroad Adjustment Board. They were wrong in this, as the National Railroad Adjustment Board has no jurisdiction over attempted modifications of collective bargaining agreements. These are major questions, not disputes of which the Adjustment Board is given jurisdiction.

B. Effect of Application to the National Railroad Adjustment Board.

The Respondent Railroad Company takes the position that having filed a Complaint with the National Railroad Adjustment Board, the Petitioners have become litigants with unclean hands. They merely state that Petitioners filed a proceeding with that Board and, therefore, Petitioners have no rights in the courts, because the jurisdiction of the Adjustment Board is exclusive.

The Railroad Company has not been willing to face the real question in this action. The Petitioners were "furloughed", as far as their Roundhouse rosters were concerned, and found that the employees listed on the rosters for the Louisville Shops area had been granted, by Respondent Railroad Company, seniority rights beyond their own district over the entire ter-

ritory previously designated as the Roundhouse district area.

Since the Roundhouse District area had an earlier origin than the Louisville Shops area, and some of the employees listed on the rosters had seniority even greater than the employees on the Louisville Shops rosters, Petitioners attempted to work out an adjustment of the situation with the Railroad Company by asking for a dovetailing of the names on the two sets of rosters. This idea was very meritorous, but it was not included in the terms of the contract. The Railroad Company might have saved itself some trouble if it had attempted to adjust matters that way. They did not; they were adamant.

We recognize that on any question in regard to the dovetailing of the names from the two rosters the application to the National Railroad Adjustment Board was exclusive, and the decision on that question was final.

On the other hand this action does not involve dovetailing. It is for a declaration of rights as between the Petitioners, representing all 66 employees on the Roundhouse rosters and the Railroad Company. This action is not brought to try to compel the Railroad Company to grant some right which was not included in the collective bargaining agreement. The rights which the Petitioners claim are those which the contracts of 1942 and 1943 gave to persons on the Roundhouse rosters and which they enjoyed through February 17, 1957.

Petitioners, in their Petition for Certiorari cited cases both before and after the passage of the Act in regard to the Railroad Adjustment Board, recognizing the rights of the Railroad employees to bring actions in enforcement of their contract rights in the Courts of Kentucky. This question has never been considered in this case by the trial Court or the Court of Appeals of Kentucky, and the petitioners will be absolutely without remedy, unless this Petition for Writ of Certiorari is sustained and this action is referred back to the Courts of Kentucky for a hearing and determination on the question of rights of the 66 employees to seniority under the only written contract in existence between the various crafts of railroad employees and the Louisville and Nashville Railroad Company.

The questions which were submitted to the Jefferson Circuit Court in Kentucky and then to the Court of Appeals of Kentucky were not presented to the National Railroad Adjustment Board, and there is no conflict with reference to exclusiveness of jurisdiction or finality of decision.

C. The Courts Have Jurisdiction Over Actions Involving Discrimination.

The Petition for Writ of Certiorari calls attention to the fact that on January 28, 1957 a conference was held between the Carrier and bargaining representatives of the Unions in regard to the collective bargaining agreement as effecting the individual rights of employees on the Roundhouse District rosters and the

South Louisville District rosters. No persons whose names were on the Roundhouse rosters were invited to this conference and none of them were advised of the decisions reached in the conference until they saw the bulletins announcing that all of them had been furloughed. They are still furloughed insofar as the Roundhouse rosters are concerned, although work never stopped in the exact geographical area where they had been working since the 1920's and at all times during the existence of the two collective bargaining agreements negotiated in 1942 and 1943.

The only excuse ever offered for the furloughing of the 66 employees on the Roundhouse seniority rosters was that there had been an interpretation changing the meaning of the contract. A change in interpretation by the Railroad Company is no more effective than a secret agreement such as was reached in the cases of Steele v. L. & N. R. R. Co. *et al.*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 133, or in the case of Tunstall v. Brotherhood, 323, 210, 65 S. Ct. 235, 89 L. Ed., 187, or the actions of the Unions in assenting to application of contract provisions in Conley v. Gibson, 335 U. S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99.

As specifically held in those cases, secret agreements effecting arbitrary discriminations against specified groups of employees, are in conflict with the Fourteenth Amendment to the Constitution of the United States in depriving these employees of their contract property rights. These cases, not the other citations given by the Respondent in its Brief in Opposition to the Petition for Writ of Certiorari, are controlling in

this case. The Respondent Railroad Company would have the Petitioners deprived of any right to go into court, merely because they went to the National Railroad Adjustment Board, basing their argument on the case of Pennsylvania Railroad Company v. Day, 360 U. S. 548, 79 S. Ct. 1322, 3 L. Ed. 1422. In that case the Court held that the employee who continued to work could not bring suit for additional pay but must go to the National Railroad Adjustment Board. We respectfully urge the Court that those employees who had sufficient confidence in their employer to continue to work for the employer, even after they had been deprived of all seniority rights, should not be deprived of the right to a day in court in regard to the meaning of the contract under which they had served for many years. As far as the Railroad Company was concerned in this case, it had terminated any employment relations with the Petitioners by permitting them to work thereafter only with a seniority starting from February 18, 1957 or thereafter.

Certainly in this case there is no such disqualification of the employees from making claims in regard to the discrimination exercised against them under the collective bargaining agreement, when they did not take before the National Railroad Adjustment Board the particular issues which they seek to have the Court determine.

The Court has not only recognized the right of the Petitioners to have their contracts respected and enforced as written, without illegal and discriminatory contract provisions, secretly added, but has specifically

held in the case of Steele v. L. & N. R. R. Co., 323, U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173; that the Railroad Adjustment Board did not have jurisdiction over controversies where the unions and the carrier had agreed upon secret modifications. That decision evidently recognizes the reason why the Railroad Company in this case made as its closing argument to the National Railroad Adjustment Board the statement that there was no disagreement between it and the Unions. Since the Act gives to individual employees the right to assert claims, why did this fact have any meaning?

The attempt abolition of a designated point under the point system, without any change in the contract, certainly amounted to a willful, flagrant, incredible discrimination from the standpoint of the constitutional rights or for the protection of property or the equality of treatment, and this conduct should shock any fair minded person. This was a plain unilateral attempted change in the provisions of a collective bargaining agreement under the pretext of an interpretation. If this was not an illegal change of a contract, as Petitioners claim that Respondents attempted, a Court should have an opportunity to decide the facts in regard to it. The change resulted in manifest discrimination against all of the Petitioners. Their only hope for relief is through a decision sustaining their Petition for Writ of Certiorari and upholding Petitioners' right to a trial on the facts. The Court should give significance to the continued publication of Round-

house rosters which are useless at present because of the Railroad Company's assumption that it can voluntarily abolish a point designated in a contract without any change in the contract itself.

RESUME.

Petitioners respectfully ask the Court to protect their rights to a hearing before a judicial tribunal as to the discrimination which has been inflicted upon them through the so-called "interpretation" of a collective bargaining agreement, secretly made so as to deprive all the Petitioners of every seniority right which had any value. They look to this Court for the protection of the property rights which they thought they had up to February 17, 1957 and to which they still believe they are entitled.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 1199 149

O. C. LEE, Individually, and J. C. LITSEY, Individually, and Both as Representatives of Machinists Employed by Louisville & Nashville Railroad Company at Its South Louisville Roundhouse on February 17, 1957, Et Al., - - - - - - - - - Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Et Al., - - - - - Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

BLAKEY HELM,
JOSEPH B. HELM,
Attorneys for Petitioners.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 1120

O. C. Lee, Individually, and J. C. Litsey, Individually, and Both as Representatives of Machinists Employed by Louisville & Nashville Railroad Company at Its South Louisville Roundhouse on February 17, 1957, Et Al., - *Petitioners,*

v.

Louisville and Nashville Railroad Company, Et Al., - - - - - *Respondents.*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

Petitioners, and those whom they represent, are long time mechanical employees of the Louisville and Nashville Railroad Company. Some of them are colored; some are white. Some belong to unions; some do not. All of them work at some specific crafts employed by the Railroad Company, with these crafts represented by designated International Unions.

These unions, as bargaining agents, have negotiated collective bargaining agreements, one of the agreements covering the skilled employees working in the crafts of machinists, electricians and sheetmetal work-

ers and the other agreement covering unskilled employees in various kinds of labor. The latest agreements were negotiated in 1943 and 1942 with some amendments since these contracts were adopted. There have been no amendments since 1957 or 1943 affecting the seniority rights of these employees.

Copies of these contracts are filed as "Exhibit A" and "Exhibit B" with the Complaint in Equity in this action. In the Appendix to the Petition for Writ of Certiorari in this action, the provisions of said contracts relating to seniority rating in specific shops in Louisville, Kentucky, are quoted. The quoted sections of the bargaining agreements provide for separate seniority rosters for the four classes of mechanical employees mentioned, at the points designated in the agreements as "South Louisville Shops" and "South Louisville Roundhouse", and for some crafts at other locations.

The common interest between the petitioners and the rest of the 66 employees whom they represent, lies in the fact that they were all listed by the Louisville and Nashville Railroad Company on the seniority rosters for the area lying West of a division fence through the South Louisville yards, this area having been designated since about 1901 as the South Louisville Roundhouse. This is the same area designated in the two bargaining contracts *supra*.

This action was filed for a declaration of rights between the petitioners and those whom they represent on the one hand, and the Railroad Company, and the union bargaining agents on the other hand. The Com-

plaint states that it arises under the provisions of the Railway Labor Act of 1934 (R. 15). The bargaining agreements were negotiated pursuant to said Act, but the points mentioned and the seniority rights designated therein, have existed from dates long prior to the existence of the present bargaining agreements.

Since 1934 the Railway Labor Act has included provisions for the National Railroad Adjustment Board, the composition of the Board being entirely of representatives of the carriers and representatives of the unions, in equal numbers. Presumably the members of these Boards have not been experienced as judges, or as lawyers, or particularly educated for the determination of legal rights, other than from practical experience in railroad operation. Nevertheless the carriers have, ever since 1934, attempted to claim exclusive jurisdiction for the Adjustment Board, of any and all controversies arising between the carriers and either the unions or individual employees in regard to rules, working conditions and rates of pay. This Court has had a steady stream of applications to it for determination of the jurisdiction of the National Railroad Adjustment Board and the limits upon its authority. Even since this particular action was finally decided by the Kentucky Court of Appeals on February 22, 1963, this Court has had presented and made further specific decisions relating to the jurisdiction of that Board.

As in many of these other cases, the Railroad Company has based its principal defense purely on the claim that this action is, by the Railway Labor Act,

placed exclusively within the jurisdiction of the National Railroad Adjustment Board. We believe that the late decisions by this Court have helped to clarify the misunderstanding and confusion caused by the attempt of the carriers, in almost every case, to claim jurisdiction within that Board.

Petitioners are asking for a declaration of rights in regard to violations of specific written agreements, and adjudication prospectively of the rights of these 66 employees as of February 18, 1957, and of each day since, under those contracts.

Petitioners proposed dovetailing rosters as a means of according fair treatment to employees on rosters of both geographical points specified, even though this idea was not in the agreements. But as to provisions of the contracts, giving to the employees, property rights by contract, petitioners insist that they have a right to their "day in court". This insistence upon an actual hearing before a judicial tribunal is in accord with the principles consistently recognized and enforced by this Court.

CONFUSION CREATED BY CARRIER'S CONTENTIONS.

The Complaint in Equity filed in this action (R. 12-35) and the Amended Complaint in Equity (R. 54-65) clearly state the facts upon which the petitioners and those whom they represent ask for a declaration of rights.

The Complaint quotes the skilled employees agreement as providing in Rule 29(b) that seniority of em-

ployees in the crafts covered by the agreement "shall be confined to the point employed". The Complaint states that that section then specifies the points for the various crafts, and that in Rule 29(c) it provides for revision of seniority rosters in January of each year. The Complaint also quotes from Rule 26 as to reduction in forces with Rule 26(g) providing that "employees will be restored to service in accordance with their seniority." Similar provisions in the agreement as to unskilled labor are quoted, with Rule 14(c) providing that "men will be returned to service in the order of their seniority."

The Complaint then alleges that on February 4, 1957 the Master Mechanic at South Louisville posted bulletins that, effective at close of work of the third shift, all mechanical operations of the South Louisville Roundhouse would be discontinued, and all men listed on the Roundhouse rosters would be cut off. This Complaint then alleges that there was in fact no force reduction, and the jobs in the area known up to February 18, 1957 as South Louisville Roundhouse were continued with the jobs allotted to employees on other seniority rosters. *These jobs have ever since been filled from other rosters.*

On investigation, it turned out that the bargaining representatives had been notified of this proposed change in use of personnel but had consented. *However, no change* was made in the written bargaining agreements. The employees listed on the Roundhouse rosters were not consulted or notified of the proposed

changes. They learned of this, by the cold February 4th announcements of a supposed reduction in forces.

By the Amended Complaint, petitioners stated that some of them were members of the unions involved and some were not. Plats were filed with it showing the location of the division fence and the two separate shops, west and east of this fence, respectively. It further stated there was actually no reduction in forces, only a change in name of the area designated as the "South Louisville Roundhouse" point, to an extended part of the South Louisville Shops.

The Amended Complaint expressly alleges that the discontinuance of the South Louisville Roundhouse was an arbitrary violation of the point basis bargaining contract, and this deprived petitioners and those whom they represent, of seniority rights acquired over long periods of time, without any actual reduction in forces. The Amended Complaint states this laying off of the petitioners and those whom they represent, was a planned discrimination, directly contrary to the agreements, and in fraud of the rights of petitioners and their fellow employees.

Petitioners state the change in use of rosters was without notice or opportunity to appear or to protest, and their supposed representatives acceded; that this constituted discriminatory action by the unions toward employees on the Roundhouse rosters. This pleading states that they appealed to the Adjustment Board, but the Unions did not help them. They actually opposed them.

The Amended Complaint recites the fact that the Railroad Adjustment Board heard a question as to closing a point and as to dovetailing, with a decision against dovetailing and a plain failure to decide the other point. The Amended Complaint states that the result of the actions of the Railroad Company, of the Unions and of the Adjustment Board has been a failure to provide them with a valid legal determination of their rights, or even a hearing, and that if the Railway Labor Act provides no hearing in Court on protection of property rights, the Act itself is unconstitutional.

The Complaint, in Equity asks for a declaration of rights under the contracts. The Amended Complaint asks that the rights of the Roundhouse employees be protected.

The confusion comes into this situation from both acts and claims of the carrier and the Unions. Some are even mysterious.

Mystery No. 1.

Why did the carrier change its method of compliance with no change in bargaining agreements, by laying off men with point seniority, and continuing the same work at the same geographical locations by using rosters for other points?

Mystery No. 2.

Why did the carrier merely notify the bargaining agents, not any of the employees to be laid off and replaced?

Mystery No. 3.

Why did the Unions fail to represent the employees on the Roundhouse rosters?

Mystery No. 4.

Why did the officials of the Unions not report the proposed changes to the employees to be replaced?

Mystery No. 5.

Why did the carrier claim to be making a force reduction, with the same jobs offered to employees on other rosters before the lay-offs took place?

Mystery No. 6.

Why did not the carrier comply with the agreements by restoring jobs in the Roundhouse area according to seniority at that point?

Mystery No. 7.

Why did the carrier refuse to work out fair treatment to all by dovetailing the names on the rosters?

Mystery No. 8.

Since the Roundhouse seniority rosters have not been used since February, 1957, and the former Roundhouse area is all used for work by employees from other rosters, why does the carrier continue each year to make up said rosters?

Mystery No. 9.

How can the Carrier allot jobs in a geographical area, designated by contract as "South Louisville Roundhouse" to employees whose seniority rights are on the "South Louisville Shops", when the contracts provide that their seniority "shall be confined to the point employed"?

Mystery No. 10.

If these facts do not constitute definite planned intentional discrimination, through contract violations and deprivation of property rights acquired by contract, what else would be necessary?

Another statement made by respondent Railroad Company's counsel attempted to answer the mystery as to continuance of the posting of Roundhouse rosters when the area is now served by employees from other rosters. The statement is in effect a quote from the affidavit of W. S. Scholl (R. 45-46):

> "Affiant further states that although all mechanical operations formerly performed in the South Louisville Roundhouse have been discontinued, seniority rosters are now and will continue to be maintained covering all employees working at said point and in which each of them now and will continue to maintain their seniority standing established at the time of the discontinuance of said mechanical operations. In the event that mechanical operations should at some time in the future be re-established at the South Louisville Roundhouse, the same employees will be given priority to the work to be performed there and with the seniority they had established before such operations were discontinued on or about February 17, 1957."

With his affidavit Mr. Scholl filed a copy of the report of National Railroad Adjustment Board proceeding (Exh. "A", R. 48). This report lists the names of petitioners and the other Roundhouse em-

ployees performing work on specific jobs prior to February 18, 1957 and the names of the employees who took over their respective jobs on February 18, 1957. This is an important fact, because respondents counsel have never conceded in briefs that the old Roundhouse area has been added to the South Louisville Shops area.

The above quotation manifests that the respondent Railroad Company considers the bargaining agreement as variable in accordance with its particular plans. Having agreed upon point seniority rights for its employees, the Carrier takes the position that it can lay off employees, then change point boundaries at will. When it laid off all the employees on the Roundhouse rosters, it only took away the seniority rights of 66 employees. If it decides to reopen the Roundhouse area, by reversing the process, it will interfere with seniority rights in a shop with more than 15 times as many employees.

This reversal of action should take place, but not by arbitrary, one-sided action of the employer; but by a Court decision that such arbitrary action in February, 1957 was illegal, and it still is. This can only come by this Court sustaining the petition for certiorari, and then deciding whether or not these 66 loyal employees are entitled to their "day in court".

REAL ISSUES IN THIS ACTION.

No indication has at any time been given as to why the Railroad Company decided to discontinue the use of the Roundhouse rosters. Its counsel have consistently stated in their briefs that mechanical operations at the Roundhouse shop were discontinued. The complaint and amended complaint in this case make perfectly clear that petitioners are claiming no seniority rights in the area described in the bargaining agreements as the South Louisville Shops, only in the prior Roundhouse area.

Their claims of contract violations are based on respondent Railroad Company, on February 18, 1957, and on each day since then, replacing the laid off Roundhouse employees with employees from other rosters on the jobs which were then, and are now, located in the geographical area designated in the collective baragining agreements as South Louisville Roundhouse. If there is an issue of fact here, petitioners are entitled to a hearing on the facts.

This is particularly true where the contract gave petitioners seniority rights for some 14 or more years, then was claimed by the Carrier to protect them no longer.

This Court's decision in Brotherhood of Locomotives v. B. & O. Railroad Company, 372 U. S. 284, 83 S. Ct. 691, 9 L. Ed. 2d 759, decided March 4, 1963, expressly points out that issues exist between employees and carriers for which the Railway Labor Act furnishes no remedy.

The secret conference held in January, 1957 was arranged because the two collective bargaining agreements specifically protected point seniority rights. Respondent Railroad Company did not procure any contract change as to the effect of combining two "point" shop areas. It took sole responsibility for action in laying off employees, then replacing them immediately with employees from other rosters. This action was in effect what was attempted in the case of Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283, in trying to replace the train porters with brakemen, without any contract with the porters.

In that case the discrimination was against a separate craft. In this case the discrimination is against the employees on rosters for shops west of the division fence. Discrimination exists in just as invidious or arbitrary form even when not based on race or creed. That Opinion says in part (p. 775) that "the District Court is left free to consider what provisions are necessary to afford these employees full protection from further discriminatory practices of the Brotherhood". This observation arises from a discussion by this Court of principles enforced in the cases of Steele v. L. & N. R.R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173 and Graham, et al v. B. of L. F. & E., 338 U. S. 232, 70 S. Ct. 14, 94 L. Ed. 22.

The opinion in Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 contains a very extensive and enlightening discussion of the jurisdiction of the National Railroad Adjustment

Board. That case really involved the question of the right of the Union to represent an employee before the Adjustment Board without his express consent. But, in the reasoning the opinion deals with the purposes of the Railway Labor Act, and holds that major controversies are not within the jurisdiction of this Board.

That Opinion recognizes that controversies arising over the formation or changing of collective bargaining agreements are not the minor disputes within the Board's jurisdiction. The opinion says (p. 723):

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."

In this case no change in the contract was made, but the Carrier attempted to make such a change on its own. That is what was attempted by the Carrier and the Union in the case of Steele v. L. & N. R.R. Co., cited *supra*, without the knowledge of the colored foremen. The Steele opinion says (pp. 203-4):

> "[14, 15] The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative

> is prohibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted."

Since the contract was not changed in January, 1957, and the Carrier decided to proceed directly in violation of the contract provisions as recognized by all parties up to that time, there was a legal issue requiring a duly constituted tribunal. Neither party sought the use of the National Mediation Board. The 66 employees desired to continue in the service of the Carrier, so did not threaten a strike over this attempted unilateral change in the bargaining agreement.

Instead these loyal employees pursued pacific means, through administrative methods to procure relief. The Carrier denied this. In further effort to effect a practical solution, the 66 employees suggested an eminently fair proposal. The Carrier had opened up the jobs in the Roundhouse area to employees on the South Louisville Shops rosters. This was contrary to the specific provisions limiting job rights to point seniority, but the representatives of the Roundhouse employees suggested that the privileges which the Carrier had wrongfully granted to the Shops employees be extended to the employees in those crafts on both sets of seniority rosters.

This was refused by the Company. The 66 laid off men took their suggestion to the National Railroad Adjustment Board. This Board, recognizing that the Unions, as bargaining agents, had not opposed the at-

tempted unilateral change in the contract, did not try to adjust matters. It made a strict ruling as to no provision for dovetailing.

The other question (a) asked whether under the agreements, "the Carrier can deprive petitioners of their seniority standing under the pretext of discontinuing jobs and reducing force, when the same work is being done as before and in the same places?"

This was the exact issue which the respondent Carrier had brought on. It related to seniority rights in the territory or point described in the bargaining agreements as South Louisville Roundhouse. This applied to operation for the future—in 1957 and in 1963. It is still an unsolved legal issue. Petitioners have rights for breach of contract. But their rights as to future operation are more important and more controlling. The 66 men on the Roundhouse rosters faced discrimination—definitely planned secretly and openly and flagrantly carried out.

The discrimination against the men for years working west of the division fence was as hostile or invidious as any treatment planned or attempted on account of race or against train porters as a class. This discrimination arose in applying, rather than in negotiating a collective bargaining agreement. But this Court has definitely condemned such use of discrimination just as clearly and effectively. Conley, et al v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80.

PETITIONERS ENTITLED TO "DAY IN COURT".

There is no occasion to discuss the failure of the Adjustment Board to recognize the legal issues presented. This is a major controversy, and did not belong before that Board. As pointed out in the Steele case, cited *supra* (p. 204):

> "[17] Since the right asserted by petitioner 'is * * * claimed * * * under the Constitution' and a 'statute of the United States', the decision of the Alabama court adverse to that contention is reviewable here under § 237(b) of the Judicial Code, 28 U.S.C.A. § 344(b), unless the Railway Labor Act itself has excluded petitioner's claims from judicial consideration."

That decision was rendered before this Court had clarified the distinction between "major" and "minor" disputes. But this Court recognized in that opinion that a determination of future rights to jobs did not belong before the Adjustment Board. The Opinion says (pp. 206):

> "In this way the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. Cf. Tumey v. Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A.L.R. 1243. There is no adminis-

trative means by which the Negro firemen can secure separate representation for the purposes of collective bargaining."

The right to a "day in court" was thus guaranteed to the aggrieved employees. The advantage of "a day in Court" was demonstrated by this Court's decision April 29, 1963 in affirming the Western District of Kentucky in the case of Brotherhood of Locomotive Engineers v. L. & N. R.R. Co., —— U. S. ——, 83 S. Ct. 1059, —— L. Ed. ——. That case involved a "minor" dispute and the employees threatened a strike. The District Court enjoined such action, and required the employee to follow procedure under the Act. The Union did get a determination as to rights under the Railway Labor Act.

In the instant action, petitioners were cut off the payrolls in a drastic manner. They used perfectly pacific methods, even displaying loyalty to their employer. At every turn, however, they have been met with dodging tactics. Even before the Adjustment Board, the most persuasive argument against them was the final statement in the position of the Carrier to the effect that:

"There is no dispute between carrier and System Federation No. 91, AFL, concerning petitioners involved in the roundhouse force reduction. *There is, therefore, no merit to the request of the petitioners and it should be denied.*" (Italics supplied)

Whether or not that was the controlling point with the Board is not important. This attitude of the carrier to prevent "a day in Court" has been per-

sistently followed by the carrier. It and the Unions, as bargaining agents have been successful in preventing any consideration of the merits of this case. Petitioners respectfully submit that this was a major controversy, which did not belong before the Adjustment Board, and that they are entitled to "a day in Court" as to the contract violations by the Carrier and the Unions, and the planned intentional discrimination against them. They are as much entitled to "a day in Court" as was the L. & N. in the Engineer's case decided last April.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 149

C. C. LEE, ETC., ET AL., - - - - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL., - - - - Respondents.

PETITIONERS' SUPPLEMENTAL PETITION FOR REHEARING.

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Supreme Court of the United States

October Term, 1963

No. 149

O. C. Lee, Etc., Et Al., - - - *Petitioners,*

v.

Louisville and Nashville Railroad Company, Et Al., - - - *Respondents.*

PETITIONERS SUPPLEMENTAL PETITION FOR REHEARING.

May it please the Court:

Petitioners, O. C. Lee, et als representing the 66 shop craft employees on the rosters of the South Louisville Roundhouse greatly appreciate the Court granting them time to file this Supplemental Petition for Rehearing. This is presented pursuant to that permission.

FACTS AS TO PRESENT CONTRACT NEGOTIATIONS.

The request for this right to file the Supplemental Petition was based upon notice to the membership of the four respondent unions in this action, of the controversies in regard to changes in the collective bargaining agreements between the unions and the Louisville and Nashville Railroad Company. Based upon

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suggestions made to petitioners by the Secretary of the National Mediation Board, request was made of the respondent Railroad Company for a copy of the proposals and counter proposals submitted. Counsel for the Railroad Company has been most courteous in furnishing this information to counsel for petitioners.

The pending negotiations, to which reference was made, are between several System Federations which are composed of unions representing six brotherhoods and associations of mechanical crafts of railroad employees throughout the United States. The representatives of these unions and System Federations have created an Employes' Conference Committee, composed of the President and Executive Council Members of the Railway Employes' Department, AFL-CIO.

These unions and federations presented to each of the principal railroad companies in the United States on October 15, 1962, proposals for changes in the operating agreements. One letter was sent on that date by System Federation No. 91 and the five associations and brotherhoods operating on the Louisville and Nashville Railroad to Mr. W. S. Scholl, Director of Personnel of that Company, with an "Appendix A" attached. An Appendix is also enclosed with this Supplemental Petition, with a copy of that letter and its "Appendix A", included as Item 1.

On November 15, 1962 Mr. W. S. Scholl, Director of Personnel, of the Louisville and Nashville Railroad Company, sent to the official representatives of System Federation No. 91 and the representatives of said brotherhoods and associations, including all of the

unions which are respondents in this action, a letter proposing modifications for existing rules and working conditions set out in an attachment "A" to be handled concurrently with the employees' proposals. A copy of said letter and Attachment "A" is included in the Appendix to this Petition as Item 2.

The Executive Secretary of the National Mediation Board acknowledged receipt of letters and telephone requests for copies of documents but indicated that his office was not accustomed to providing copies of documents or proceedings except to parties to specific negotiations. He referred to these negotiations as those covered by the letter of October 15, 1962 from the shop craft organizations and the counter proposals of the carriers. Petitioners appreciate his cooperation in this matter.

1. Nature of the Proposals Made by the Employees.

The changes suggested by the employee organizations were contained in the "Appendix A" mentioned above. These suggested changes are outlined in that Appendix and will be discussed more fully later.

The four requests for rule changes are well summarized in the data furnished with the Strike Ballot as follows:

> "The October 15, 1962 notice made the following requests for rule changes:
>
> "(1) That work performed by one craft shall not be transferred to officials or supervisors or employees in other crafts except by agreement between the carrier and the general chairman of the craft involved.

"(2) That work shall not be contracted out which belongs to a craft unless agreed to by the general chairman of the craft involved.

"(3) That the same type of protective provisions as are in the Washington Job Agreement shall apply to employees displaced or deprived of employment as a result of any changes in the operation of the carrier, such as transfers of work assignments, discontinuance or consolidation of facilities or services, contracting out of work, leasing or purchasing of equipment or component parts thereof, technological changes and changes of a similar character.

"(4) That the coupling and uncoupling of air, steam and signal hose, testing air brakes and appurtenances on trains or cuts of cars in yards and terminals shall be Carmens work."

2. Nature of Employers' Counter Proposals.

The additional proposals, or counter proposals, as they have been described, are contained in the Attachment "A" as mentioned. These provisions are much more general in their application and are included under seven main headings as follows:

"1. CLASSIFICATION OF WORK
2. CAR INSPECTORS
3. MODERNIZATION OF AGREEMENTS TO MEET CHANGING CONDITIONS
4. COMPULSORY RETIREMENT
5. STARTING TIME
6. CHANGE OF ARTICLE IV, AUGUST 21, 1954 NATIONAL AGREEMENT
7. GENERAL"

Proposal No. 3 of the Employee organizations involves displacement and lay-off of employees. All of the carrier proposals would affect working conditions of railway employees, but the suggestion having most applicability to issues in the pending action is No. 3 as to Modernization of Agreements. Under this provision as to modernization there are subdivisions (a) and (b), with subdivision (a) containing ten specific suggestions. The subdivision starts with this provision:

> "(a) Eliminate all agreements, rules, regulations, interpretations and practices, however established, which in any way handicap or interfere with the carrier's right to: . . ."

Subdivision (b) likewise relates to changes in methods with the first sentence reading as follows:

> "(b) Whenever the introduction of a change in methods or operation such as those set forth in paragraph (a) hereof cannot be accomplished, or where its benefits could not be fully realized without the consolidation, merger or elimination of one or more seniority districts, the carrier shall give thirty (30) days' *notice to the affected organization or organizations.*" (Italics supplied.)

The last sentence under subdivision (b) reads as follows:

> "This provision will also apply in any and all other instances where a carrier desires to consolidate, merge or eliminate one or more seniority districts.

MODERNIZATION OF AGREEMENTS.

The pleadings and briefs in this action all show that petitioners and those whom they represent had not only been employed for years by the Louisville and Nashville Railroad Company, but also that they had been employed through bargaining agreements which provide for point seniority rosters in two separate shops maintained by the Railroad Company in its South Louisville Yards. Gradually, the change in the use of power equipment from steam locomotives to diesel engines made less necessary the use of a roundhouse building and more necessary the use of pits and other equipment in railroad shops. The South Louisville Roundhouse Shops were started earlier with the Easterly shops, formerly known as the Back Shops (now as the South Louisville Shops), being started some years later. These shops have lately been developed more extensively. The division line between the two shops has been definitely recognized, and marked by a division fence which still exists in part, and which separates specific areas within the South Louisville Yards. (Exhibit "E" and "F" with Amended Complaint, R. 60-61.)

The number of personnel employed in the South Louisville Shops had been increased until they numbered at least fifteen times the number of employees in the Roundhouse Shops, prior to February 17, 1937.

Nevertheless the Railroad Company had in 1942 and 1943 made agreements which recognized the point locations for each of these separate shops, just as prior

collective bargaining agreements had. As appears in the data given to the National Railroad Adjustment Board, some buildings in these two shops had been removed prior to 1957 and some new pits had been constructed in each of the shops (Ex. "C" with affidavit filed by Mr. Scholl R. 47).

This action does not involve any question as to the right of the Railroad Company to increase the amount of work being done in the South Louisville Shops, East of the division fence or even the right to diminish the amount of work performed West of this division line. It only involves the right of the Railroad Company (with no protest from the bargaining representatives) to eliminate a point where it maintains seniority rosters, but perform exactly the same work with men from the same crafts at the same geographical location (West of the division line) with employees from different seniority rosters.

Counsel for the Carrier have continuously attempted to describe the petitioners' position as being a claim for the right to jobs in a different geographical location. An examination of the allegations of the Complaint in Equity (R. 12-38) and the Amended Complaint in Equity (R. 54-68) will demonstrate that no claims have been made by petitioners to any rights within the Shops area, East of the division fence. The carrier's counsel are thus bringing in an issue presented to the Adjustment Board, as to dovetailing rosters from different Shops. Dovetailing is not involved in this action.

The request made, October 15, 1962 by Unions for the employees for specific changes, includes provision

(c) with respect to employees displaced or deprived of employment as a result of changes in the operations of the individual carrier. The agreement on May, 1936, made at Washington D. C. is an agreement which relates primarily to the dislocation of employees on the consolidation of two or more carriers. The employees seek now to have the same kind of protection in cases where one Railroad Company either transfers work, abandons or consolidates facilities, contracts out work or makes changes in work assignments or operations other than those resulting solely from decline in volume of traffic.

This request shows that the modernization of the railroad operation is bound to include the abandonment of some work areas and the consolidation of facilities. The employees recognize that some of the collective bargaining agreements do not sufficiently protect the employees in cases of such transfer, consolidation or discontinuances.

Changes of the type made by the laying off of all the employees on the Roundhouse rosters, for a *supposed* force reduction, which did not occur, would be covered by such alterations requested by the employees. Fortunately for the employees listed on the Roundhouse rosters, they had geographical protection up through February 17, 1957. The Railroad Company might have discontinued that shop but it did not, and so long as the work continued in the geographical area, the contract gave to the employees on the Roundhouse rosters the priority in job assignment there. In other words, with the particular agreements then in

effect on the Louisville and Nashville Railroad, the shop employees were protected from displacement within a geographical area by the geographical point seniority system. The employees over the country generally now desire protection such as the L. & N. had given to its Shop employees in the South Louisville Yards, through the point seniority system. This is now requested in the proposals submitted by the representatives of the employee organizations.

On the other hand, in the so-called modernization of agreements the carriers seek the right now to transfer work from one facility to another without interference, the right to partially abandon any operation and to consolidate facilities heretofore operated independently and the right to make effective any other changes in work assignments or operation. By this last cover-all provision, the carriers seek to eliminate the effect of any provisions providing for point seniority rights.

By point 2 (b) under the heading of MODERNIZATION OF AGREEMENTS TO MEET CHANGING CONDITIONS the carriers propose that, where changes involve consolidation, merger or elimination of one or more seniority districts, the carrier shall give thirty days notice to the affected organization or organizations. The rest of subsection (b) is devoted to the question of reaching an agreement between the carriers and the employees' organization. The second sentence of subsection (b) provides:

> "All parties affected by the change shall, before expiration of the notice period, engage in

joint negotiations in regard to the consolidation, merging or elimination of one or more seniority districts."

This entire subsection (b) recognizes the fact that existing collective bargaining agreements may have provisions with binding effect in geographical areas, and that the carrier, in consolidating or abolishing such districts, may have to recognize the property rights of the employees to seniority, which would be destroyed or otherwise seriously impaired for the future. These rights are similar to those which arise with labor organizations covered by labor agreements in other fields. Remuneration for the loss or impairment of these rights has been definitely recognized in these other fields.

Such changes might transfer seniority rights or include other advantages or remuneration to compensate the displaced employees. The present agreements contain no provision for notice and were not subject to change, without notice except by agreement.

These are just the type of negotiations necessary when changes in contracts are desired or needed, as apparently was true in the overnight displacement of the entire Roundhouse personnel. That is where major controversies exist, and negotiations are required, rather than arbitrary unilateral action of a carrier. The failure of the Railroad Company to recognize its obligation to negotiate a major controversy caused the situation here requiring a declaration of rights as to jobs in the Roundhouse Area *after February 17, 1957.*

THE CARRIERS' PENDING PROPOSALS MIGHT TERMINATE EXISTING CONTRACTS AS TO POINT SENIORITY.

The foregoing discussion has demonstrated that both the carriers and the unions recognize that modifications in the various bargaining agreements are needed. They further recognize that the changing of the bargaining agreement is a major controversy within the meaning of the Railway Labor Act. They have even sought the aid of the National Mediation Board which handles major controversies when called upon.

When the Louisville and Nashville Railroad Company decided to combine the operation of its two South Louisville Shops, it arbitrarily disregarded the contract rights of the Roundhouse employees under the point seniority provisions of the bargaining agreements. For some reason it used the expression "force reduction," but the allegations of the Complaints in this case, and the facts otherwise presented, show that this was subterfuge. What the Railroad Company needed then, is what it needs now, to procure a modification of its contract, so that by negotiations or otherwise it may provide for proper recognition of accrued seniority rights and for remuneration of any impairment of these rights. Its position is in no way strengthened by the statement of its counsel that if the Railroad Company in the future decides to use the Roundhouse area, it may use the Roundhouse rosters (when in fact the Railroad Company is now using all the time in the Roundhouse area, employees from other seniority rosters).

The suggested modernization change in rules in the carriers' suggestion 3(b) is exactly what the parties to the present agreements, both with the skilled employees and the unskilled employees, needed in February, 1957. The employees on the Roundhouse rosters had a right to have their seniority recognized in accordance with principles well established by court decisions in the State of Kentucky. The Railroad Company now seeks to provide a method by which such agreements can be changed to some other arrangement through negotiation with notice and provision for a final and binding determination by an arbitration board. The method suggested is a fair and just approach, and it is a definite and specific recognition of exactly what the parties to these contracts had a right to expect, and to receive, in 1957. The unilateral change in the application of the contract so as to eliminate the use of the Roundhouse rosters, but to use the area for other employees, means that the Railroad Company failed to recognize its legal duties in reference to a major controversy, and shows now that it should have then sought a contract change, instead of arbitrarily violating its agreement with discrimination against the 66 employees on the Roundhouse rosters.

By this method of amending the agreement so as to provide for arbitration and a binding agreement with reference to property rights, the Railroad Company is now recognizing the existence of the rights of the employees on the Roundhouse rosters. This new approach demonstrates the contract violations now as

well as at all time since 1957. If this action is reversed and the discarded employees have an opportunity for recognition of their seniority rights, they may find that some agreements will be made with reference to these rights through methods provided by the very negotiations now in progress. But if the negotiations do bring such a change, it will be with the Railroad Company dealing with petitioners as contracting parties, and with a sense of fair treatment of its long time employees, who now are continuing to have to suffer from the arbitrary action of the Railroad Company in changing the method of operation in the Roundhouse area overnight in February, 1957, without any consultation even with the employees laid off.

The proposals for modernizations of Rules, etc. contained as one of the conditions needing changes in the agreements, "Starting Time". That feature of working conditions is a primary one, but it is not any more so than following contract provisions according seniority rights in specific geographical area.

Hardly could there be a situation involving a clearer issue as to changing the terms of a contract, than where a contract, through recognition by all parties concerned, meant one thing for over 12 years, then one party assumed to change the operation of the contract by arbitrary unilateral act, discriminating against all employees on seniority rosters for the area.

JEFFERSON CIRCUIT COURT HAS JURISDICTION.

This action was brought in the Jefferson Circuit Court in Kentucky. That is a court of record with general civil jurisdiction (KRS 23.010). The action is brought for a declaration of rights, as authorized by legislation in Kentucky (Ky. RCP 57; KRS 418.040-418.090). The Jefferson Circuit Court denied jurisdiction, but on the grounds that the jurisdiction of the National Railroad Adjustment Board was exclusive and that its finding is final. It is important in this consideration that the Chancellor never examined the issues decided by the Adjustment Board or as to whether the issues were within that Board's jurisdiction.

The Chancellor went even further in this case in denying jurisdiction of the claims against the Unions. His opinion says in part (R. 72; Pet. for Cer. App. A. Item 4, p. 4a):

> "Unions cannot discriminate against plaintiffs for some invidious reasons such as race or religion, but freedom from discrimination does not require that the union in every grievance agree with its aggrieved member. Justice requires that the aggrieved party have an opportunity to be heard before a proper tribunal. These requirements have been fulfilled."

That Court erred right there for the Railroad Adjustment Board had no jurisdiction as between an employee and the Union, which is his bargaining agent.

and the respondent Unions were not parties before that Board. The Courts alone have jurisdiction.

Steele v. L. & N. R.R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173;
Conley, et al. v. Gibson, 335 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80.

Nor did the National Railroad Adjustment Board have jurisdiction of the issues presented for declaration of rights. The primary question arose from the carrier by its unilateral arbitrary decision applying the agreement, as to geographical point seniority, as meaning the employees on the rosters for the Roundhouse area have seniority through February 17, 1957, but *thereafter* as meaning employees from other rosters would take over.

It was the carrier's duty then to seek an amendment to its existing contracts. This rule is applicable not only to altering a written collective bargaining agreement, but to actions in interpreting and applying such an agreement. Conley, et al. v. Gibson, et al., cited *supra*.

The issue as to dovetailing which was taken to the Adjustment Board was an attempt at adjustment by possible extension of priority rights to the Roundhouse employees as well as to the Shops employees, as had already occurred. This was not in the contract, and it is not involved in this case.

Voluntary construction by the parties for a substantial period of time has always been recognized as most persuasive evidence of intent. Here we have

this in two relationships. The Louisville and Nashville established the Roundhouse Shop about 1900. The present bargaining agreements were applied by the parties as meaning that the employees working in that shop had seniority rights there from start of employment, some as far back as 1922 and 1923. This should have been long enough for the employees on those rosters to have been consulted first, even if the Shops were to be discontinued. But the unilateral decision of the carrier was, not to discontinue work there, but to issue misleading bulletins as to "force reductions," then to use the Roundhouse area for employees from other rosters for the same work, immediately and without loss of shift.

The other voluntary interpretation applies not to the contract but to the procedure for changing contract rights. In 1957 the carrier attempted unilateral action which made the accrued seniority rights in a geographical area practically (if not entirely) worthless. Now in 1962 and 1963 this same carrier is recognizing that to change working rules, it should give 30 day notice and negotiate, with arbitration, if necessary. We respectfully insist that without negotiation or other such procedure, the carrier had no right to violate its contracts, which it had respected for years.

The arbitrary discrimination and violation of petitioners' constitutional rights, which the carrier produced then, continues as to jobs under those contracts today and tomorrow. The principles announced in the Steele and other cases, recognize that petitioners were entitled to *their day in court* on violation of ac-

crued seniority property rights. A non-lawyer Adjustment Board could not give this. We respectfully ask that this action be reversed for a declaration of rights as to protection of property rights under the Constitution, and as to manifest discrimination, as even the Chancellor recognized.

Respectfully submitted,

BLAKEY HELM,
JOSEPH B. HELM,
606 Louisville Trust Building,
Louisville 2, Kentucky,
Attorneys for Petitioners.

Blakey Helm
Joseph B. Helm

SYSTEM FEDERATION No. 91

Railway Employees' Department

of the American Federation of Labor

Congress of Industrial Organizations

Louisville & Nashville Railroad and K. & I. Terminal Railroad

Louisville 2, Kentucky

October 15, 1962

Mr. W. S. Scholl
Director of Personnel
Louisville and Nashville Railroad Company
908 W. Broadway
Louisville, Kentucky

Dear Sir:

Please consider this letter as the usual and customary thirty-day notice under the Railway Labor Act, as amended, of our desire to revise and supplement all existing agreements to effectuate the provisions set forth in "Appendix A" attached hereto, such provisions to be effective November 13, 1962.

It is our desire that conferences on this notice be held at the earliest practicable date and in any event prior to November 13, 1962, and that you, within ten days after receipt of this notice, suggest a date, time and place for this conference. In the event that we are unable to reach an agreement upon the foregoing request at such separate system conferences, we further propose that the matter be handled on a joint basis with other carriers which are receiving like notices.

On the assumption that an agreement may not be reached in system conferences, our System Federation has joined with other System Federations serving a like

notice upon other carrier managements, in the creation of an Employes' Conference Committee composed of the President and the Executive Council Members of the Railway Employes' Department, AFL-CIO.

In the event an agreement is not reached in our separate system conferences, we request that you join with other carrier managements who are receiving a like notice, in the creation of a Carriers' National Conference Committee which will be authorized, like our Employes' Conference Committee, to negotiate to a conclusion in accordance with the procedures of the Railway Labor Act, the subject matter of this notice.

This notice is served in behalf of the employees of the Louisville and Nashville Railroad Company represented by the following organizations:

1. International Association of Machinists
2. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
3. Sheet Metal Workers' International Association
4. International Brotherhood of Electrical Workers
5. Brotherhood Railway Carmen of America
6. International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers

operating through the Railway Employes' Department of the American Federation of Labor and Congress of Industrial Organizations.

Very truly yours,

(s) Herman Webb,
Herman Webb, President
System Federation No. 91

(s) Herman Webb,
Herman Webb, General Chairman Int'l. Brotherhood of Electrical Workers

(s) L. N. Woods,
L. N. Woods, General Chairman Sheet Metal Workers Int'l. Association

(s) Ray Abner,
Ray Abner, General Chairman Int'l. Brotherhood of Firemen and Oilers

(s) Ray Abner,
Ray Abner, Secretary-Treasurer System Federation No. 91

(s) J. L. Bailey
J. L. Bailey, General Chairman Brotherhood of Railway Carmen of America

(s) B. B. Kidwell
B. B. Kidwell, General Chairman Int'l. Association of Machinists

(s) D. W. Christian
D. W. Christian, General Chairman Int'l. Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers

RA'c
Encl.

APPENDIX A

Notwithstanding the provisions of any agreements heretofore made between this carrier and any of the organizations signatory hereto:

(a) None but mechanics or apprentices regularly employed as such shall do mechanics' work of their craft as per the special rules thereof, and no work of any craft covered by such agreements shall, under any circumstances, be performed by any official, supervisory officer, or by employees who are employed in another craft; except at points where it is agreed that there is not sufficient work to justify employing a mechanic of each craft and agreement is reached between the carrier and the General Chairmen of the crafts involved arriving at special arrangements for the performance of work at such points.

Motor vehicles (passenger or truck) used for road service will be driven by an employee of the craft whose work is to be performed.

In case of any violation of this rule, the employee or employees who would have performed such work if it had been performed without violation of this rule, shall be compensated on the same basis as if they or he had performed the work.

(b) Except pursuant to a special agreement as to specifically described work made in each instance between the representative of the carrier and the General Chairman of the craft involved, all work, which if performed by the carrier with its own employees would be covered by such agreements, shall be performed by employees covered by such agreements, and the carrier shall not,

(1) Contract with others for the performance of such work.

(2) Contract with others for the trade in or repurchase of equipment, unit exchange, the installation, repair, re-

building or replacement of equipment or the component parts thereof, or

(3) Lease or purchase equipment or component parts thereof, the installation, operation, servicing or repairing of which is to be performed by the lessor or seller.

In case of any violation of this rule, the employee or employees who would have performed such work if it had been performed without violation of this rule, shall be compensated on the same basis as if they or he had performed the work.

(c) The same protective benefits as those afforded by Sections 4, 6, 7, 8, 9, 10 and 11 of the Agreement of May, 1936, Washington, D. C., shall be applicable with respect to employees who are displaced or deprived of employment as a result of changes in the operations of this individual carrier such as:

(1) Transfers of work;

(2) Abandonments, discontinuances or consolidations of facilities or services, or portions thereof;

(3) Contracting out of work;

(4) Lease or purchase of equipment or component parts thereof, the installation, operation, servicing or repairing of which is to be performed by the lessor or seller;

(5) Voluntary or involuntary discontinuance of contracts;

(6) Technological changes;

(7) Installation of labor saving equipment and machinery;

(8) Trade in and repurchase of equipment or unit exchange;

(9) Any changes in work assignments or operations other than those resulting solely from decline in volume of traffic.

(d) The coupling and uncoupling of air, steam and signal hose, testing air brakes and appurtenances on trains or cuts of cars in yards and terminals, shall be Carmen's work.

(e) The foregoing rules shall supersede any provisions of existing agreements not consistent therewith.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

November 15, 1962
H-420

Mr. J. L. Bailey, Acting President, System Federation No. 91 and General Chairman, Brotherhood of Rwy. Carmen of America, Louisville, Kentucky

Mr. Ray Abner, Secretary-Treasurer, System Federation No. 91 and General Chairman, Internat. Brotherhood of Firemen and Oilers, Louisville, Ky.

Mr. W. T. Lewis, General Chairman, International Brotherhood of Electrical Workers, Nashville, Tennessee

Mr. B. B. Kidwell, General Chairman, International Association of Machinists, Louisville, Kentucky

Mr. D. W. Christian, General Chairman, International Brotherhood of Boilermakers, Huntington, W. Virginia

Mr. L. N. Woods, General Chairman, Sheet Metal Workers International Association, St. Louis, Missouri

Gentlemen:

Our letter of October 23, file H-420, in reply to yours of October 15, 1962, in connection with your desire to revise and supplement all existing agreements to effectuate the provisions set forth in Appendix "A", attached thereto.

Without waiving our position concerning the propriety of your proposals, this is notice that we desire to eliminate or modify certain existing rules and working conditions

as set out in Attachment "A" hereto, to be handled concurrently with such of your proposals as are deemed bargainable if and when it becomes appropriate to do so.

Yours truly,

W. S. Scholl,
Director of Personnel.

ATTACHMENT A

1. CLASSIFICATION OF WORK

All agreements, rules, regulations, interpretations and practices, however established, governing the classification of work of mechanics, helpers and apprentices of employees represented by the following organizations:

International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers.
Sheet Metal Workers' International Association
International Brotherhood of Electrical Workers

shall be merged into three classification of work rules. The first rule shall govern the work of all mechanics, the second the work of all helpers, and the third the work of all apprentices. Thereafter any work covered by such a consolidated rule may be assigned to and performed by any employee of the class to which the rule is applicable irrespective of craft.

The number of mechanics, helpers and apprentices in the craft of machinist, sheet metal worker, blacksmith, boilermaker and electrician to be employed shall be determined as nearly as practicable by the ratio which exists in each seniority district among these crafts on the effective date of these rules.

2. CAR INSPECTORS

All agreements, rules, regulations, interpretations and practices, however established, which restrict the character of service of car inspectors are hereby eliminated. Car Inspectors may hereafter be required to perform any work which may be assigned to them provided such work is included in the classification of work rules applicable to carmen.

3. MODERNIZATION OF AGREEMENTS TO MEET CHANGING CONDITIONS

(a). Eliminate all agreements, rules, regulations, interpretations and practices, however established, which in any way handicap or interfere with the carrier's right to:

(1) Transfer work from one facility or location to another facility or location;

(2) Partially or entirely abandon any operation or to consolidate facilities or services heretofore operated independently;

(3) Merge or coordinate in whole or in part two or more carriers;

(4) Contract out work;

(5) Lease or purchase equipment or component parts thereof, the installation, operation, maintenance or repairing of which is to be performed by other than employees of the carrier;

(6) Voluntarily or involuntarily discontinue contracts whereunder a carrier performs service for another carrier or for any other party;

(7) Effect technological changes;

(8) Install labor saving equipment and machinery;

(9) Trade in and repurchase equipment or exchange units;

(10) Make effective any other changes in work assignments or operation.

(b) Whenever the introduction of a change in methods or operation such as those set forth in paragraph (a) hereof cannot be accomplished, or where its benefits would not be fully realized without the consolidation, merger or elimination of one or more seniority districts, the carrier shall give thirty (30) days' notice to the affected organization or organizations. All parties affected by the change shall, before expiration of the notice period, engage in joint negotiations in regard to the consolidation, merging or elimination of one of more seniority districts. If agreement has not been reached within thirty (30) days of the date of the notice, any party may submit the question for final and binding determination to an arbitration board consisting of a representative of each organization involved, an equal number of carrier representatives and a neutral member selected by the participating members. Should the parties fail to agree upon the selection of a neutral within ten (10) days from the date of the service of such notice, the parties, or any party, to the dispute may certify that fact to the National Mediation Board, which Board shall, within ten (10) days from the receipt of such certificate, name a neutral. If the parties to the dispute fail to agree upon the fee to be paid to the neutral, the National Mediation Board shall stipulate the amount of such fee. The arbitration board shall begin hearings within ten (10) days of the appointment of the neutral. Findings shall be rendered in writing by the arbitration board within thirty (30) days from the date of the beginning of the hearings on the particular dispute, such findings to be final and binding upon all the parties to the dispute, whether or not such parties appear before the arbitration board. The arbitration board shall not undertake to determine whether the change is to be introduced but shall confine its decision to the consolidation, merger or elimination of seniority districts. The arbitration award

thus rendered may be made effective thirty (30) days after the date of such award or at a later date if the carrier, for operational or other reasons, so decides.

This provision will also apply in any and all other instances where a carrier desires to consolidate, merge or eliminate one or more seniority districts.

4. COMPULSORY RETIREMENT

All employees subject to the provisions of this agreement who are seventy (70) years of age or over must retire from active service no later than ninety (90) days subsequent to the effective date of this agreement. Thereafter the mandatory retirement age shall be progressively lowered until it is sixty-five (65) in accordance with the following schedule:

January 1, 1964—69 years of age
January 1, 1965—68 years of age
January 1, 1966—67 years of age
January 1, 1967—66 years of age
January 1, 1968—65 years of age

Existing agreements which provide for retirement at an earlier age than herein set forth remain in full force and effect.

5. STARTING TIME

(a) Eliminate all agreements, rules, regulations, interpretations and practices, however established, which limit or restrict a carrier in fixing or changing the starting time or quitting time of employees or provide for uniform starting or quitting times.

(b) The starting time of employees may be at any time except between 12:01 A.M. and 5:00 A.M., and the starting time of any employee or group of employees at a point or facility shall not be restricted by reason of the starting

time of any other employee, group of employees, or shift. The starting time will be designated by the carrier, and may be changed on not less than twenty-four (24) hours' notice.

(c) If it is desired that a starting time be established between 12:01 A.M. and 5:00 A.M., the matter will be handled between local officers of the carrier and of the labor organizations involved looking toward agreement responsive to operational needs.

6. CHANGE OF ARTICLE IV, AUGUST 21, 1954 NATIONAL AGREEMENT

Eliminate Note 1 to Article IV of the August 21, 1954, Agreement between the carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committees and the employees thereof represented by the Employes' National Conference Committee, Fifteen Cooperating Railway Labor Organizations. This contemplates the elimination of that part of all agreements, rules, regulations, interpretations and practices, however established, which impose the restrictive principle contained in Note 1 to Article IV of the August 21, 1954 Agreement.

7. GENERAL

(a) Where, in relation to any of the above proposals, an agreement, rule, regulation, interpretation or practice, however, established, exists which is more favorable to the Carrier, such agreement, rule, regulation, interpretation or practice may be retained.

(b) Where, in relation to any of the above proposals, no agreement, rule, regulation, interpretation or practice exists which imposes the limitations or restrictions which would be eliminated by such proposal, the fact that the subject matter is included in this uniform Attachment A is not to be construed as an admission that such limitation or restriction exists on this Carrier.